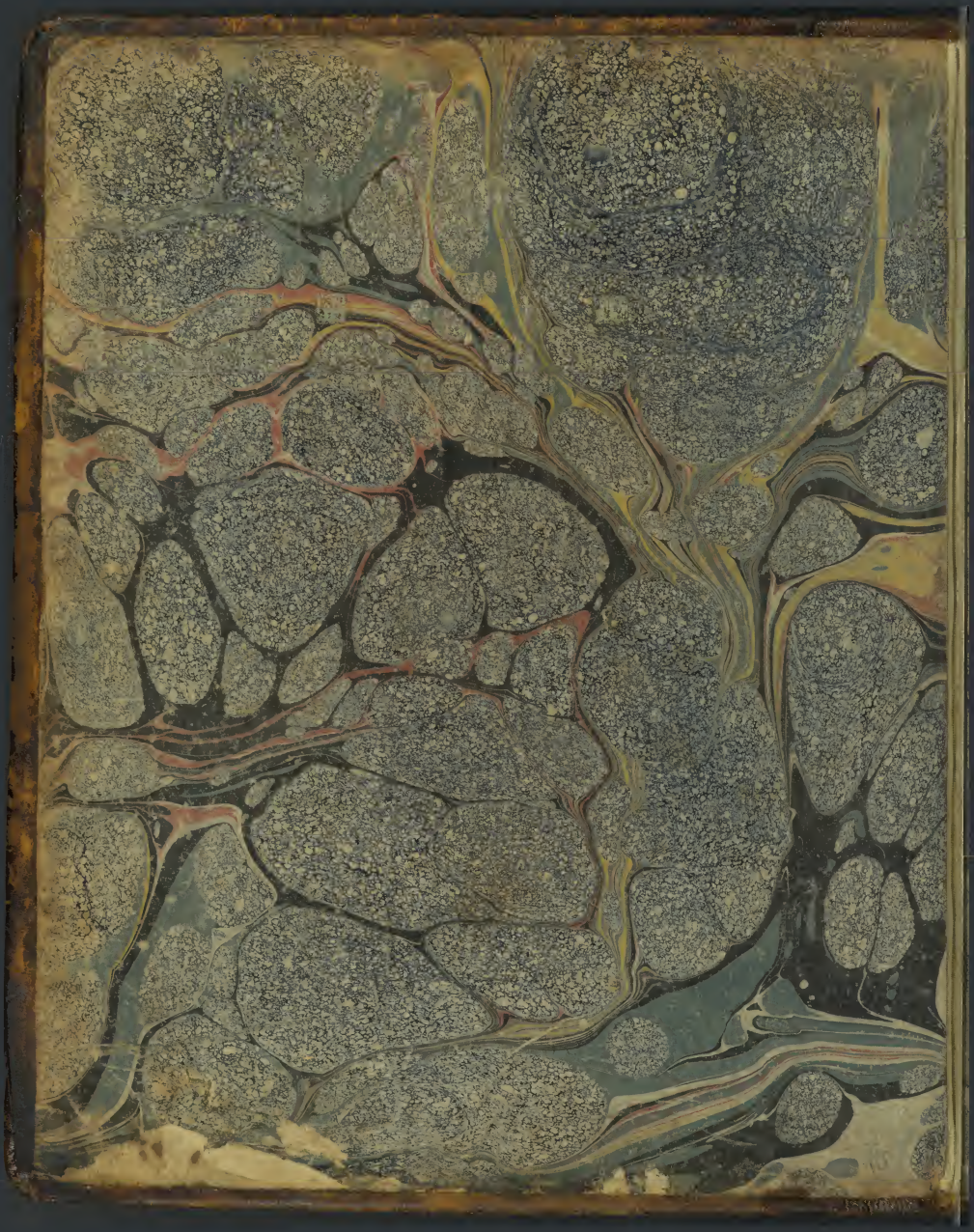

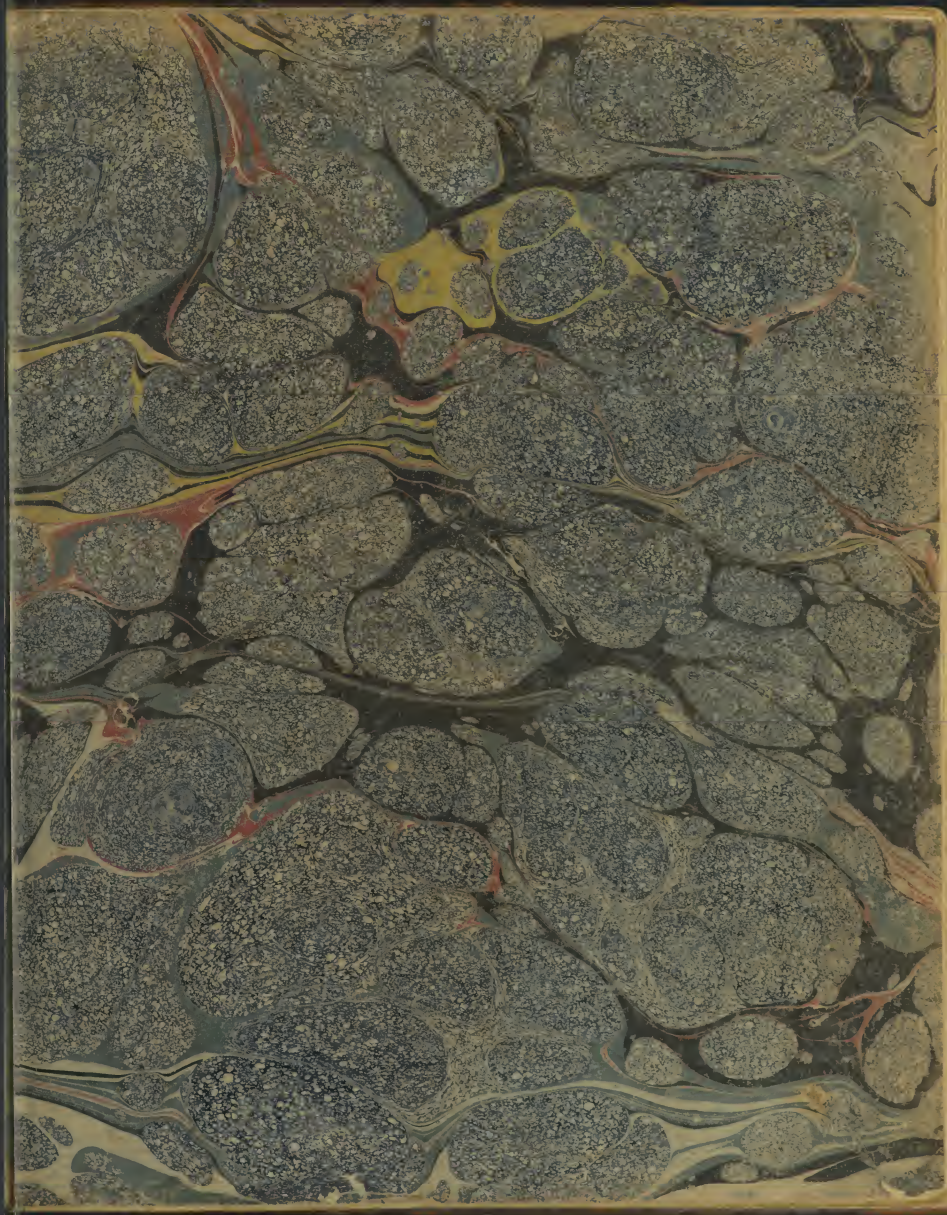

Topping Rees Esq.

Contracts.

must appear from when either delivered in the contract or acknowledged in it or it is sealed importing one or by annual deliveries

Contracts.

A contract is an agreement upon sufficient consideration to do or not to do a particular thing – 1 Bur. 6. 2 Bla.

A written contract not under seal is in Eng. considered as a par not contract; But in Con. it is considered as a specialty – 7 T.R. 143.

Both in Law and in Equity it is essential to the validity of a contract, that there be a consideration, or that the contract be such that no proof can be admitted to show that there was no consideration – 5 T.R. 143.

A man cannot be compelled either at law or equity to fulfil a contract entered into without consideration, unless the nature of the contract precludes all inquiry respecting the consideration –

The quantum of consideration is not however considered regarded: Tho' if the thing specified as the consideration, have no value as a peck the contract will be void – 5 T.R. 373. 2 Bos. 144. 152.

But it is not easy to discover how a pepper corn which is a sufficient consideration is more valuable than a peck.

The relation of Landlord and Tenant is a sufficient consideration to support a promise –

It is a common opinion that a written contract under hand and seal is valid without a sufficient consideration, acknowledging a consideration. But a written contract in itself considered no more binding without a consid-

Remarks.

Bur. 1609, 1608-
1 Ves. 332. 341.
342. 2 — v — 240.
3 Term. 326 299.
2 T. R. 680. 3 — v —
421. 2. 7 T. R.
340. 341. note
477 —

Vide. 403 ——

O for the consideration is only to give effect to the contract it is not to furnish evidence to prejudice that they may the seem rather does it furnish prejudice evidence that he has paid a ren[illegible] of it — consideration prejudiced from sealing which of the instrument [illegible] [illegible] length of it is more void

Contracts.

-nation than a parol contract would be: for if from the face of the writing, it appears that there was no consideration it is void. Qu. is it void? May not nominal damages be recovered?

But if it do not appear from the face of the writing that there was no consideration, the contract if reduced to a special ty will be binding as to the parties. Parol proof being inadmissible ~~to prove~~ to prove the want of consideration in a special contract unless the rights of third persons are effected by the contract.

The consideration of a contract expressed in a <u>deed</u> is conclusive as to the existence, kind, and substance of the considera-tion between the parties; but it is only <u>prima facie</u> evidence ~~of~~ as to the <u>quantum</u>.

On voluntary single bills or covenants only nominal damages are recoverable, the consideration, being I suppose ex-tinguishable as to the existence & value thus as no other thus the implied one from finding damages ~~out~~ nominal.

If a consideration be acknowledged and it does not appear from the face of the writing, whether it is sufficient or not, the parties cannot go into an enquiry respecting it; but ~~f~~ third persons interested may, and tho' a valuable considera-tion should appear upon the face of the writing: yet third persons may prove that there is no consideration.

Quere. Are even nominal damages given if it appear from the face of the consment that there was no considera-

Remarks.

o The pearl-yes estopped

1 Pow. 146. b.

1 Roub. 60 — —
3 P. Wms. 129.
1 Pow. 31. 2 — —
22 B — — —

1 Ev. Ro. 163. 3 — —
— 370 —

2 Ro. 164 —

Contracts.

tion - And can want of consideration be proved, if the covenant expressly acknowledges a consideration - 0

If the consideration of the contract be illegal it may be enquired into as between the parties themselves -

An undue advantage taken of a mans situation, being unconscionable vitiates a contract in Equity tho' not at Law.

Equity will relieve against fraud or imposition practised upon persons of weak mind; as also where parental influence is used to induce a child to enter into a Contract -

But if the parties to a contract were upon an equal footing, and no imposition or undue influence was practised - equity will not interpose tho' one may have obtained the advantage in the bargain - Courts of Law even in cases where there is no actual contract, will upon the idea of an implied contract compel the payment of money which is justly due -

Principles of policy indeed prevent Courts in some few instances, from lending their aid; but when no such considerations militate against private justice, the court will in all cases compel a deft. to pay over money, which in good conscience he can not retain and to which the pltff. in good conscience is entitled -

A contract merged in a security revives when the security is avoided if Justice requires its revival -

Remarks.

Pour 2 lb. 22s.
42s. Exp. 76.

Stra. 1027. 24h.
48s—

Contracts.

A parol contract is not merged by being reduced to writing but if a bond or other security which moves the consideration out of sight, and enquiry be given, the parol contract is merged: and a written contract expressing the consideration may be merged in the same manner. Time or to a debt which is to accrue in future — as an annuity payable by instalments when a bond is given to secure it the bond acknowledges a present debt.

A person cannot by performing part of an entire contract entitle himself to recover the whole.

Persons by law disabled to contract.

It is a general rule that all persons who have not the physical or moral powers to contract; or who have not the exercise of their powers are by law disabled to contract from making a valid contract. An assent it is said is necessary to the binding force of every contract and an assent in consideration of law involves the free and deliberate use of those powers therefore the absence of either of these powers in either party to the contract renders that party incapable of binding himself by such contract or agreement.

The observations according to Mr. Reeve applying

Remarks.

Pow. 10.

Pow. 11. 4 Co. 123.
3 Mod. 196.
3 Ch. Ld. Ky.
319. 316. Atkyns.
198 - - - - -

Contracts.

all cases of express contracts. But when the contract is implied an assent is not of course necessary. It is a common opinion among lawyers that the binding force of such contracts depends upon an implied assent, but it is apprehended that this opinion is untrue; and the true ground on which such contracts are enforced is, not that there is an implied assent but that it is a just right, that they should be performed —

There are some cases in which an implied assent is apparent, but there are others in which it cannot be implied. Thus where a husband turns his wife out of doors and forbids all persons to trust her on his account, he is bound by her contracts for necessaries, and this it is said is on the ground of implied contract; yet plainly no assent can be implied for the term assent denotes "the acquiescence of the mind to something proposed or affirmed" and in this case there is an express refusal —

There are several descriptions of persons who fall under the general rule first laid down

I. Idiots, Lunatics and persons of non sane memory are incapable of assenting. These contracts therefore are not merely voidable but void: and they may always plead non est factum. This rule is evidently a just one but there seems now to be a current of opinion, that a lunatic &c cannot take ad-

Remarks

Cro. El. 39 Hob. 99.
612 - 622. 4 Co.
123. Bro. 11 Ke

Hob. 41. B. —

1 Hob. pane
47. Ke

1 Vent. 414. S
Atk. 107. 17 C

vantage of his lunacy & to avoid his contracts. This opinion is as old as the year books. Yet the only reason assigned in support of it, was, that no man shall be allowed to stultify himself. But the heir at law of such lunatic & it was admitted might avoid the contracts of his ancestor — Courts seem to have held that it was indecent for a man to stultify himself, but that his child or whoever his heir was might do it with propriety. Fitzherbert in his Natura Brevi. attempts to prove that was not always the law and Blackstone in his Com. evidently ridicules the opinion by his mode of considering it. The opinion however is supported by many modern ~~authorities~~ opinions —

Powell indeed assigns an additional reason in support of this rule he maintains, that if a man were allowed to stultify himself it would open a door for fraud —

This argument however carries no more force, when urged against a man's stultifying himself, than against every mode of avoiding the contracts of Lunatics, since in whatever manner they are avoided the same dangers of fraud exists. But it is settled that the contracts of Lunatics may be set aside ~~that~~ in two ways —

1st Where ~~the grounds of fact~~ found that a man is a lunatic, the King or his legal guardian may avoid all contracts made

Remarks.

1 P. W. 2. 119.

1 Eq. cas. 279.

3 P. Wms 191.
2 Vern. 19.
1 Ch. Ca. 62. 75.
3 P. 72.

Contracts.

by such person after he becomes a lunatic –

2d A suit may be brought forward by the Attorney General in Chancery with whom the lunatic may be joined to avoid all contracts made after the lunacy commenced. On application to the Chancellor commissioners are appointed to examin whether a person is a lunatic &c – And if he be found such a sire facias will issue, for all creditors to show reason why his contracts should not be set aside –

Now what possible objection exists against the lunatics avoiding his contracts at law, which does not lie against the Attorney General's avoiding it in the lunatics name in a court of Chancery?

II. The second class of persons disabled from contracting are drunken men; their contracts are with certain qualifications avoidable. There has been no decissions upon this point in a court of law –

The general rule adopted in the Court of Chancery is this "If one induces or in any way causes an other to be intoxicated and then takes advantage of his situation so as to overreach him in a bargain, the bargain is voidable in chancery –

But if a person find an other drunk and take advantage of his situation, to make an unfair contract

Remarks.

Nov. 19.

Feb. 86. 63. 65.
& P.W. 129

Contracts.

with him: there is no decided case that warrants the interposition of Chancery to avoid the contracts — yet in an undue advantage is taken of an others situation in this case it would seem that upon principles adopted by Chancery in other cases, the contract might be avoided —

If however in the case above, the contract be not unreasonable Chancery will not interfere tho' the drunkenness of one of the parties was caused or induced by the other — there is otherwise one case of this kind —

+ The general reason why all contracts entered into by drunken persons may not be set aside is founded upon policy; since such a rule would lead to dangerous consequences, in a country where the opportunities for intoxication are frequent.

If money be taken from a drunken man without any consideration an action of Trd. Assumpsit lies to recover it; this action whenever it lies is convenient with relief in Chancery.

III. In cases of contracts made by persons of weak minds; the degree of weakness that will warrant the interposition of Chancery is matter referred to the discretion of the Chancellor. Indeed Courts of Chancery deny that they ever set aside contracts on the ground of weakness in one of the parties they being we are told no Judges of the weakness of intellect. They assign fraud for the reason of their interference

Remarks-

Feb. 640.

Vem. 218.

Ver. 82. Ver 694 –

Contracts.

But the fraud in one party is evidently a weakness in the other, and the former cannot be supported from the cases decided, without first supposing the latter.

If unfair advantage be taken of a person, whose mind is weakened by sickness Chancery will grant relief.

IV. The contracts of Feme Covertes and Infantes have been considered under other heads.

Of the binding force of contracts as to the parties and others.

Some persons may by their contracts bind not only themselves, their Heirs Exors &c but others also; as for example heads of corporations, Select men of a town Agents, Attorneys &c. Agents Attorneys &c can bind their employers only when specially authorized. Select men have a ~~power~~ general ~~po~~ power.

Heirs Exors and Admors are bound by covenants of their ancestors &c if they have assets.

An heir may be compelled in Chancery to carry into effect, the agreements of his ancestor.

A joint tenant may also be compelled to execute an agreement or covenant ~~made~~ made by his deceased

Remarks.

1 P. Wm 398.

2 Ver 239.—
1 J. R. 169—

Contracts.

fellow tenant to convey. Chancery considering the joint estate as severed, from the time, at which the covenant to convey was made —

A husband is in many case bound by the contracts of his wife —

A subsequent mortgagee is preferred to a prior mortgagee; if the latter acquainted with the subsequent mortgage does not give information that the same property is mortgaged to himself —

If a prior lessee neg a second to take a lease of the lands leased to himself from the lessor, the second is preferred —

If a settlement is made of intailed lands or a jointure in lieu of dower and the person entitled to the remainder in tail knowing of the transaction, does not give notice of his claim his right shall be postponed to the Jointure —

If a person holding a bill of exchange fail to give notice to the drawee when it is dischanged he shall loose ~~this~~ his claim —

If a grantor of lands expressly inform the grantee that he shall not have ingress ~~o~~ over his the grantor's land, the law will notwithstanding give the gran-

Remarks.

1 T.R. 269.

1 P. Wm. 239.
726. 3-a-316
3 T.R. 757.

1 Bur. 196.
Mosely 364.

Cow. 201.
1 Doub. 182.
Doug. 63. 2 T.R.
766

Contracts.

=tee, the right of ingress &c if it be necessary.

A grant to a lunatic is good. So a bona fide grant to one who knows nothing of the grant, is valid. if afterwards assented to by the grantee.

If a party contracting is ignorant of his rights, such ignorance will sometimes invalidate the contract.

But a compromise of a dubious title is binding notwithstanding ignorance in ~~both~~ either of the parties. Ignorance of the law it is said will not exonerate a party from the obligation of his contract.

But this rule does not appear to be strictly true. For in the dispute of two brothers respecting the right of inheritance referred to the School master and afterwards settled between them, by agreement; the only ground on which the agreement was set aside was the ignorance of one respecting a rule of law.

On the same ground was an orphan relieved, against her own election of a less sum than she might by law claim.

Contracts capable of being affirmed or avoided.

A voidable contract may be ratified by matter ex post facto, or a subsequent promise; but a void contract can=

Remarks—

1 Pow. 162.

2 T. R. 768. 2.
— 25 Doug 671.

Burr. 2670—

1 Pow. 269.

2 Pow. 156—

2 Pow. 129.

Contracts.

=not.

A contract obtained by duress, may be affirmed after the du=ress; yet if it be affirmed under ignorance of the law as to its bin=ding force, Chancery will relieve against it.

A promise made by one of whose critical or unfortu=nate situation advantage is taken, to procure the contract, is not binding.

A promise to pay a note, by promisor when it is out=lawed, is not binding: if the promisor is ignorant of his legal right to refuse payment. Quare as to this rule.

Ignorance of the law, appears to be the only ground for setting aside contracts in these cases: but no definite rule seems to be established for determining in what cases ignorance of law shall have this effect.

Ignorance of fact fraudulently imposed, is always reason sufficient for setting aside a contract.

If a misrepresentation be made respecting the true state of the property, from ignorance, and not from fraud, the rule respecting the contract, which the misrepresenta=tion has effected is this "If the contract would not other=wise have been made, it may be wholly set aside; but if the contract would have been made tho' no misrepresen=tation had been made, it must stand.

Remarks.

1 Ves. 150

3 Ch. R. 757.
759. 3 Bl.

1 Ford. 224.
225. 226.

8 Brown's P.
Cases 117

Contracts.

In some instances the intention of the parties as to the nature of their assent will be inferred, from circumstances, as from the price, and the like – Thus if a man sell a horse for a round price, the contract will be void unless the horse was round –

But in the case of a bill of Exchange, Lord Kenyon was of opinion that if the holder sent it to market without indorsing his name upon it; neither morality or the laws of Eng. would compel him to refund the money for which he had sold it, if he did not know at the time, that it was not a good bill –

It is a general rule of law, that in express contracts, if the thing stipulated for, is not delivered; it would at the time that the contract is to be performed is the rule of damages, in an action at law for non performance –

Any contract ~~not~~ naturally impossible to be performed (except a bond with an impossible condition of which hereafter) is void, and money paid to induce a performance of it, may be recovered back in an action of Ind. Assumpt. But if the impossibility of performance arises merely from the ~~ina~~ peculiar circumstances of the party undertaking, an action lies to recover damages for non performance –

But in some cases where it is impossible

Remarks.

Ld. Ray. 1664.
6 Mod. 305 —

Doug. 14.

1 Salk. 172. 1
Roll. 420.
9 H. Bl. 257.
3 Ch. Ab. 6. Co.
Lit. 206.

Co. Lit. 219.a
352. 1 Bl. Rep.
781. Dyer. 180.
2 Bl. Rep. 162.
1 Blun. 622 —

Contracts.

for the party stipulating, to fulfill his engagement, or when thro' want of ~~science~~ acquaintance in science he is igno=rant of the value of what he promises to perform, as in the ~~case of~~ early courses, courts of law have made the value of the article sold, the rule of damages. The propri=ety of such a decission may be doubted: for by establishing such a rule of damages, the Courts evidently make a con=tract which the parties never intended or contemplated. Besides, as fraud, or undue advantage is very apparent in cases of this kind, it would seem that the contract need not be established at all.

It is generally true that a promise to do one of two things, in the alternative leaves the promisor at lib=erty to elect which he will perform, unless contrary in=tention appears.

A bond &c, with a condition which is idle, frivo=lous, impossible or illegal, is good, and the condition is void; but in this case if the condition is incorporated with the bond the whole is void.

If a condition ~~be~~ partly impossible by the act of God, or of the law, it ought to be so far performed as possible.

In Lon. if the penalty of a bond appear to be

Remarks.

(a) Assessed damages is where the damages are previously agreed upon by the parties; as for instance A. lets land to B. both plough and medow ground upon the condition that if B. ploughs any of the medow he shall pay to A. 10s in this instance the court will not chancer down the 10s because it is the exact damages assessed between them — But had B. given to A. (in the room of the 10s) a bond of a £1000 this would have been in the nature of a penalty and the Court would have chancered it down to what ever they should have thought the real damages were sustained by A —

2 T. Rep. 32. 4 — 12 G. 1 Bar. 544. 3. Eq. 2. 1 Ch. Ca. 1 Ch. Rl. 227. 6 Mo. P. caser 470 — Bur. 2225. 1 Lev. 111 —

1 Pow. 266. 2 Ch. Rl. 227. Co. Lit. 206.

2 Ch. Rl. 574. 5 Co. 29 a. 1 Roll 452 —

1 T. Rep. 628.

1 T. Rep. 645.

1 Pow. 164.

Contracts.

in the nature of assessed damages[a], Courts will not chancer the bond, otherwise they will: Courts of law are in Eng. unpowered to chancer by statute.

In cases of bonds for money, it is done, on payment of principle and interest: or bringing into Court principle, interest, and costs.

If an impossible precedent condition be annexed to the grant of an estate, the estate can never vest.

But if there be an impossible subsequent condition on performance of which the grant is to be defeated, the estate vests absolutely.

If the act of a stranger be by the terms of a contract necessary to the performance of a ~~contract~~ condition precedent, and he wrongfully refuse to act, the party bound to performance is not to suffer.

One party's preventing the performance of a condition is equivalent to a performance by the other.

Thus the Deft. preventing the performance of a condition precedent to the Pltffs right of action, is equivalent to performance by the Deft.

A contract in order to be binding, must be not only naturally possible, but morally so, that is, must be lawful.

A promise which the party making, has no power

Remarks.

necessary the two kinds explained — 1 T.R. 22. 34.
must be pleaded to avoid uncertainty 1 Saw. 108.
the word corrupt is essential
the usury includes usurious bargains 1 Fonb. 213.
of meal & colourable bargains — 1 Saw. 108 —
the case of ballooning bonds considered
the case of gambling not usury. 1 Bro. 182. 196.
the case of loan made by mistake not usury 1 H. Bl. 322.
& contract goods are bad usurious are void 827. 7 T.R. 542.
when avoided the good ones remain D — 1 — 87 —
usurious money recoverable back
the principle on which they are done Eyd. 156. Bur.
the lender & borrower are both as 2069. 2 H. Bl.
principals quere how 379. 3 T. Rep.
failed payable at any time begining 418.
end of a year — compound interest
not usury — simple interest only is
more valid of the power of charging Lowth. 39. Geo.
in such case — El. 199.
necessary words to all contracts are
of negotiable words — 10 Mod. 157.
& among traders fully & absolutely Low. 841. 10 Rep.
& were usury illegal as was 100. 1 Fow. 164.
made to depending of real & fair, 176. 195. 7 T.R.
with no usury penalty — 475. ——

Hob. 12. 1 T.R.
56. 3 — 11 — 17.
4 " 466. —

7 T. Rep. 610.
3 " 693. — 3.
Lowth. 729. 2
H. Bl. 48.
1 " El. 349.
1 Fow. 142. 3.
5 Mod. 374 —

no stipulation usurious bargains
out of

Contracts.

to make, either in fact, or law, is void –

A contract may be unlawful, as being malum in se or malum prohibitum.

It may be malum prohibitum, as being first opposed to some statute: secondly contrary to the welfare of the community: or thirdly contrary to some maxim of law –

A security given, or a promise made, in consequence of a transaction deemed illegal, by positive law, is not of course void: as if one of two partners, or a son restrained by both, in an illegal undertaking, pay the whole, and take a security from the other for the payment of part –

An engagement to do an unlawful act, or to pay or indemnify another for doing it, is void

A contract made to induce an omission of duty, is void as being unlawful –

A contract tending to incourage any unlawful act, or omission, is illegal, and void. This rule operates even against strangers, if they collude with and assist the native in violating the laws –

A mere wagering contract affecting the peace of third persons: tending to introduce indecent evidence, or operating against sound policy, is, in Eng, where wagering contracts are sustainable, void –

Remarks.

1 Term. 489.
490 —
2 — " — 70. 71.
2 H. Bl. 809.
1 Pow. 207.
4 T. R. 69. 85.
2 H. Bl. 46.
Str. 789. 1 Pw.
181. 181. Eno. J.
296. Palm. 1 Pe.
1 Bro. Ch. cas.
419. 1 Mod. 27.
85. 190.

4 T. R. 166.
Burr. 2025.
1 Ver. 500.
2 Wils. 347.
Pow. 165. 6.
8. 174. Show.
P. cas. 76. —
2 Pow. 81. Ke
1 Term. 75. 2 —
— 14. 1 P. W. 30
3 — " — 292.
2 Ver. 159 —

2 Pow. 150.

Contracts.

But generally wagers are sustainable at Com. Law—

At Com. Law gambling is not illegal. A wager respecting the mode of playing an unlawful or illegal game, is void— Quare is not every idle wager void—

A contract not to pursue a trade be is void: tho' a contract not to pursue a trade in any particular place, if made upon a reasonable consideration is good—

Marriage brokage bonds, tho' good at law, are void in Equity, as being intrinsically corrupt. 8 Lev. 411. 1 Fonb. 249. 253—

In case of a contract with an heir apparent for an estate in expectancy, if there be great inequality in the terms of the contract, and the money was expended by the heir in dissipation, Chancery will grant relief. But otherwise no relief can be obtained unless perhaps where the inequality is so great as to afford evidence of fraud—

If an unlawful contract, which was not binding, be actually performed, no relief can be had either at law or Equity provided that both parties are equally guilty—

An infant may however recover by Ind. Asp. money which he has lost at gambling: yet he is clearly particeps criminis—

And if one party has been induced by necessity, to pay money upon an illegal contract, it may be recovered back in

Remarks.

Doug. 455.
Cow. 790—

1 Bos. 174.
2—11—170. B.
763. 4 T. R.
166—

Burr. 1077.
1 T. R. 793—

Dyo. 175. Co.
Eliz. 20.
1 H. Bl. 462.
Burr. 176.
1094—
1 Mod 69.

2 Mod. 307.
Salk. 991.—

Contracts.

an action of Indeb. Asst. Ind. Asst. however now lies for money which the holder in good conscience cannot retain.

If a man has received money as hire for the performance of an unlawful contract; Ind. Asst. lies to recover it back, if brought before the act committed, but not afterwards.

Contracts made to defeat third persons, are illegal and void. 1 Ven. 220. 456.

An illegal transaction be one of two partners, void as to the other; that is he is not effected by it, he not being privy or consenting to it.

By a stat of Ann contracts for money won at play are void. By an other stat. the securities for money lost at the time and place of play are void.

If one unsound security be made the consideration of an other, the latter is void.

If one of two contracts is unsound, and they are both blended together in one security: and that security is afterwards avoided, it has been a question whether the good contracts revives. On principle it would seem that the good contract would ~~revive~~ revive, for such security when avoided is considered as void to all intents and purposes ab initio. It cannot even be given in evidence.

It would be absurd to ascribe to such a security

Remarks.

Esp. 175.

contract respecting lands executed according to the
lex loci of the place where the land is — Bac. 1094.
contract to have the same effect that the lex loci where 7 T. Rep. 241.
it was made would give it, according where as the rule
of interest. otherwise if not to be performed there 2 H. Bl. 52.
but where it is to be performed — as to forms the
lex loci where the suit is brought is to prevail the
that of Eng as to the promise — contract to do
that which is malum prohibitum here but
not there where to be done lex loci of the place where
to be done governs. if malum in se the Bac. 1094 —
law is otherwise — trespass to arrest in country not
here yet remedy here of bred here for a trespass in
N. York — the rule double damages where
done the lex loci of that place governs

Contracts

so great efficacy as to merge and annihilate a contract, which was originally valid –

A bond obtained by duress as a security for a contract of a lower nature, does not avoid the principle contract. But if one part of an entire contract is void the whole is void also –

Lex Loci.

It is a general rule that when a contract is entered into in a foreign country, Courts will support it agreeably to the laws of the country where it was made –

But if a contract be made to be performed at home, and is contrary to the laws of there existing, courts will not support it. So if the contract be to do a thing malum in se, Courts will not carry it into execution, tho' it be agreeable to the laws of the country where it was made –

If judgment be had the interest of the country where where it was rendered is to be allowed on the judgment in case of delay –

It is a general rule that a person is to be tried & punished for a crime in the state where the crime is committed. But if any person has received a private injury in consequence of ~~committ~~ the commission of a crime

Remarks

4 Bl.

1. Ton. 622 G. 234.

Pous. Ru. 421.

Contracts.

he may have an action to recover damages against the person injuring, in any state: the action being transitory. And if double damages are given in the state where the injury is sustained, that will be the rule of damages in the state where the action is brought.

If a person is guilty of a transaction, which is treason in the state where committed, be prosecuted in a state where it would not be so considered, yet the law of the state where the act was done will govern; If a contract is made in one state to be performed in an other the place of performance will govern.

Lands must be conveyed according to the laws of the state where the lands lie.

Usury.

Usury is an unlawful contract upon a loan of money, to receive the same with exorbitant interest.

By the Eng. stat. of usury, any contract by which more than five pr. Cent are received for the loan of money is received for the loan of money, is absolutely void, and in addition to the loan if more than five pr. Cent its treble value is forfeited be received its treble value is forfeited and may be recovered in an action popular.

Remarks

Doug. 223. Burr. 2250. 2 T.R. 241. 3 — 589 — 184. 8 W.Bl. 250. 2 Mod. 307.

2 Sev. 893 — 205.

Bulb 17.

1 Freb. 22. 235.

1 Hut. 218. Co. J. 508.

Pow. 112. 671. 2 T.R. 230 — 238.

Contracts.

An illegal receiving, subjects to the penalties of the stat, an illegal reservation makes the contract void, but an illegal reservation does not incur the penalties of the stat, nor does an illegal receiving affect the contract –

If upon ~~the loan of~~ a contract for the loan of £100, £8 be reserved, at the time, and an obligation for £100 with legal interest, too much is reserved, and the contract is void.

A contract good at first cannot be made usurious by matter ex post facto.

Courts of equity in considering usurious contracts aside from the rules of positive law, expunge only the excess over legal interest, and allow the lender to recover in the same manner as if the contract had been originally legal. This rule obtains when the obligor brings a bill to have the security delivered up, and not when the obligor is Deft.

A parol agreement to take more than legal interest made at the same time of the execution of the bond, reserving in the bond only legal interest, avoids the bond –

A seperate note given to secure usurious interest, is not only void itself but renders the principal contract void –

Any shift or contrivance by which more than legal interest is received, makes void the contract –

Remarks

1 Foub. 293. Cow
114. 2 T. R. 238
3 — 11 — 501. 1 Atk.
301. 1 — 11 — 251.

2 Vent. 83. Ca
Ja. 677. Crab
501. 1 T. Bl. 277.

3 T. R. 503. Q
Show. 32 Ga

Contracts.

When the object in view between the parties is a fair money, no excess of price, nor any sum taken for forbearance, will render the transaction usurious.

But if the sale be colourable only, and the real object be a loan - exorbitance in price, or an exorbitant sum allowed for forbearance, will render the contract usurious, as much as if there had been a direct lending in the first instance.

To make a contract usurious, it is necessary that it be corrupt, for no mistake of whatever kind will render it usurious. And whenever there has been a mistake which wears the appearance of usury, the Plft. in his replication to a plea of usury, may set forth circumstances to prove that there was no intention to take more than lawful interest.

If in an action on a usurious contract, the Plft. fails in the manner in which he charges the usury, the Deft. must prevail.

In Asst. usury may be given in evidence under the general issue; in the case of speciatty, it must be pleaded.

The superior court of this state have established a rule for the computation of interest. See Kirby's Reps.

The federal court have adopted the former part of this rule, of the superior court in all cases.

Remarks

1 Show. 8. Cro.
9. 308. Cro. El.
40. 3 Wm. 390
1 Forb. 231 or
331. 6. 4 T. R.
358. Moore 598.

Cro. El. 642.
741. 5 T. R. 59.
Cath. 68.
1 Forb. 231.

1 Forb. 232. or
232. Burr.
704. Cro. El.
28. 1 Shaw 8.

1 H. Bl. 227.
Cow. 112. 1 Forb.
221. —

Contracts

The casting of interest in a mode different from that established by the courts of law, with no intent to evade the stat., does not constitute usury – And it is now settled that the receiving of money for interest before the end of the year is not usurious, tho' some what more than the legal interest is in this way retained –

When according to the terms of the contract there is an actual and bona fide interest risk or hazard of the principal, a reservation of more than legal interest is not usurious: as in the case of an annuitier for lives &c. On the ground of an actual risk of the principal, the lending of a cow to be returned in 3 years with another cow is not usurious –

But there must be an actual lending, and a real risk run, or the contract is usurious.

The hazard in these cases must be real, and not merely colourable, tho' in many cases it may not be easy to distinguish the pretence from the reality –

Any attempt to evade the stat. by ingenuity artifice, &c, will bring a person within it –

An increase of interest, in the nature of a penalty, for not paying the principal at the time appointed, is not considered usurious – – – – – – – –

Remarks.

3. Ch. 534. 2 Lud.
B—

4 Bac. 54. Hob.
72. Ste. 49 b.
7 T. R. 53. Burr.
1077. 1094.

Toubl. 100 B.
2 H. Bl. 402. B.
558. Doug. 1900
595. Ignicar.
ob. 2 Bl. 8 Bl.

2 H. Bl. 147.
412. Burr. 1080.
B. N. P. 114.
Co. Lit. 79 b. 80.

Contracts

It is however usurious, if merely colourable to wade the stat.; the obligor having it in his power to avoid the additional interest by punctuality, is the reason why the rule back makes it not usurious: yet only lawful interest is recoverable —

Usury must be pleaded to an action on a usurious bond, but not in the case of a simple contract —

If a contract be made, and to be performed in a foreign country, in which the contract is made, their laws respecting interest are allowable —

It is presumed that if a contract were made in one country, and the security for it made in an other, the interest of the country in which the contract was made, might be reserved in the security — Quere, if the original contract was intended to be performed in this case in the latter country —

If both parties for the purpose of evading the stat., should go into a foreign state, and there execute a contract for the loan of money; such a contract would it is presumed be governed by the laws of that state where the parties belonged —

There also an analogy between this case, and that of a marriage celebrated in a foreign country, between persons who go there to evade the laws of their own country.

Compound interest is not considered as usurious,

Remarks.

4 T. Ro. 613.
616—

3 T. Ro. 431.
6—11— 410. Ino.
J. 22. Burr.
2069.—

Gelv. 67.
Com. 4—

I Gde. or as
above— —

Contracts.

but from principles of policy, courts will not allow more than simple interest to be recovered upon a contract reserving compound interest. But if compound interest be actually paid, or if a separate interest security be taken, making principal of the compound interest which has accrued, Courts consider payment or security as legal.

But when the lender (profiting by the embarrassed situation of the borrower) takes compound interest as a condition of forbearance, courts of chancery will grant relief.

If a sum not greater than compound interest but more than simple interest be reserved, not as interest, but for the forbearance of the con contract is usurious.

If one usurious contract be made the consideration of an other, the latter is void: but a corrupt agreement to which the pltff. was not privy, shall not injure him. thus when one note was taken in satisfaction of two others, one of which was usurious, it was adjudged by the superior Court of this state, that as the pltff. was not privy, the last note in his hands was good, and the original note was purged by the subsequent transaction. Quere Is this ~~decission~~ decision consistent with the established principles of law?

It is an estatetished rule of law that interest on

Remarks.

Dun. 1086.
2 T. Ro. 33. 8.
7—11—124—

3 T. Ro. 531.

3 T. R. 538. or
588. 2 Stra. 829.

Cro. Ja. 508.

2 T. Ro. 498.
4—11—166—

Contracts

liquidated sums, tho' not expressly reserved, is payable from the time of payment.

If no time of payment be fixed, it accrues from the date of the security.

A loan of stock, or of money produced by the sale of stock, on an agreement, that the borrower shall replace the stock, or repay the money with such interest as the stock would have produced, is not usurious, tho' the interest exceed the legal rate, and tho' the money was to be repaid on a day subsequent to that on which the stock was to be replaced.

A plea of usury must set forth the principal sum loaned, and the sum reserved for interest.

Averring a corrupt agreement for more than lawful interest, for that the Plff. received more than lawful interest is not sufficient.

A special verdict finding an agreement to pay more than lawful interest, but not finding that it was corruptly agreed enables the court to give judgment for the Deft.

Contracts void on account of Fraud.

Fraud in the execution of a Contract, renders it absolutely void.

Remarks.

Bur. 391. 396.
474. 460. 482.
2 Pow 449.
Doug. 434.
450

37 R. 438.
or 439a

Contracts

And non dft., and non est factum, may be pleaded to such a contract. But if the fraud be in the consideration the contract is good at law, unless it be for money only and the fraud be total nor is it strictly speaking void in Equity, tho' Chan. will in some cases of this kind relieve against the fraud, as hereafter mentioned; but tho' contracts of this description are good at law, yet the party injured may obtain legal redress by an action for damages. The reason assigned for this distinction between fraud in the execution, and fraud in the consideration, is that in the ~~consideration~~ former case, the party imposed upon, does not in contemplation of law assent to the contract, but that in the latter he does — But it seems to me that the assent is virtually wanted in both cases. The real ground of distinction I apprehend to be this, "that when the fraud is confined to the consideration, it would be impossible in many cases to determine from the terms of the contract, whether fraud had been practised or not. But as to fraud in the execution the line of distinction is obvious —

Courts of law have lately shown a disposition to set aside contracts for fraud in the consideration. When there is a particular fraud in the consideration of a contract, and the legal remedy will not be ~~effected~~ effectual, as if the party who has practised the fraud, is unable to respond the damages recoverable at law, Equity will grant relief; not

Remarks.

indeed by annulling the contract, but usually by offsetting the damages, which might be recovered at law against the contract, and by striking such a ~~ball~~ balance as justice requires: or in other words by annulling the contract, on condition of the obligor's paying ~~such~~ what is justly due. But the party applying for remedy in cases of this kind, must shew the insufficiency of the legal remedy.

If a contract be set aside for fraud in the execution, still the party who has practised the fraud, may sue upon the bona fide contract, originally agreed upon between the parties, and recover at law, yet equity would not in this case decree a specific execution of the contract in his favor, because he has not acted an honest part thro' the whole transaction.

When there is fraud in the execution of the contract, the party imposed upon not having paid, cannot at Law recover damages for the fraud, for before damages are sustained by payment, he cannot have suffered. But by filling a bill in Chancery, he may compel the party to surrender the obligation.

It is a general rule that equity cannot relieve, when an adequate remedy can be had at law. By an adequate remedy, is meant, one which will effectually answer the

Remarks

Eng. J. 474.

2 Bac. 594.
Exp. 629.

Contracts

demands of Justice, and if such remedy is not afforded by law, or cannot be obtained without great expence and uncertainty, Chancery will interfere and grant relief –

When on a contract last mentioned of the kind last mentioned, one has paid money, he may in disaffirmance of the contract recover what he had advanced, in an action "for money had and received", or in an action for damages in affirmance of the contract –

But if the property parted with in this case, be any other than money, the latter remedy only can be obtained for an action "for money had and recieved" lies for the recovery of not property but money itself – – –

of a dolol fraud in the consideration how al land in Con.

Actions of Fraud

An action of fraud lies as soon as the fraud or the falsity of the covenant is discovered –

This action lies in all cases of fraud. 2 d. Rep. 543. 3 Rs. 581. 1 Com. 166 –

I. It lies upon a warranty, when one falsely warrants property sold as being his own, or as being good in its kind –

II. It lies on the false affirmation, when the vendor of property affirms that it possesses qualities which it does not –

Remarks.

2 Dev. 118. 120

Doug. 20. Poul.
109. 110. 373.
1 H. Bl. 17. Esp.
629. Gilb. 20.

1 H. Bl. 17.

Doug. 20

Stra. 414.

Doug. 20.

3 Ch. 36. 1 Com.
156. 1 Poul. 110.
B. & P. 80. —
Doug. 632 —

Esp. ——

Contracts

IIII. When the vendor of property conceals private property defects known to him –

In the first and last case the action lies on the express warranty –

In case of an express warranty, it is not necessary to entitle the vendee to damages, to show that the vendor knew the warranty to be false, it is sufficient that the warranty prove false –

If a warranty prove false at the time of making it, the vendee may support an action without either returning the property, or giving the vendor notice of the soundness &c

When there is an express warranty, Apt. will lie –

That an action may be maintained on the warranty, it is necessary that the warranty be made at the time of the sale, tho' if it be made at a different, that is suppose at a time previous to the sale, an action of fraud will lie on the false affirmation –

Quere. Is not the action for false affirmation founded on tort, and the action for false warranty on Contract?

In an action for false affirmation, ~~notice~~ scienter it is said, must be stated –

No action of warranty will lie when the vendor warrants qualities which it is apparent to every one that the property does not possess –

Remarks.

(1) It is now settled that damages may be recovered — 1 T. R. 746. 2. H. Bl. 17. 19 —

Sp. 629. 632.

Roll. 5. 26. 27.

1 H. Bl. 578.

3 T. R. 759.
Poph. 143 —

1 Ld. Ld. 109. 378.

Carth. 90.
3 T. R. 57. 59.
60 — Cro. J. 46.

Contracts.

If the purchaser of unsound property, which was warranted, sell it, after the vendor has refused to ~~sell it~~ take it back, still the former may sue on the warranty.

Any imposition appearing to be an express fraud, will lay a foundation for an action of fraud, even tho' the vendor said nothing to deceive the vendee. Concealing defects, amounts to a warranty.

If an express warranty ~~amounts to~~ be accompanied with an agreement by the vendor, to take back the goods, if on trial they are found defective, the buyer must return the goods as soon as he has discovered the defect, in order to maintain ~~the action~~ his action on the warranty.

If one purchase property of no value at all, the vendor not knowing the defect, but being entirely honest in making the contract, it is doubtful whether any action for damages can be maintained, by the vendee; an action for fraud certainly cannot. (a)

Whenever one sells property to an other, the law raises an implied warranty on the part of the vendor, that the property is his.

When one buyer on this implied warranty, property which the vendor did not own, the vendee in bringing his

Remarks.

Salk. 210. 10 Mod. 142. 1 Keb. 583. Cro. Ch. 472. 1 Sid. 146 —

Cro. J. 469.

3 T. R. 57.

Salk. 211. Yelv. 20 —

3 T. R. 51 —

2 P. W. 223 —
1 — " — 301.
Tilthcor. 41.

Contracts-

action for damages must according to some ~~according to some~~ authorities state scienter, in the vendor, and in others he need not. Show. 68.

According to an authority in Eng. Jurr, a false affirmation of qualities, which the article sold do not possess, is no ground for an action for damages, but this authority seems to be overruled-

An affirmation is a warranty in law, if it was so intended-

A mere opinion given by the vendor respecting the property sold, lays no foundation for an action of fraud-

As if A. says "one person is worth a £100.", But if he should say "I rented my farm for five pounds last year to Tom. Brace, when in truth the rent was but £2. and this induced the vendee to purchase, an action of fraud will lie, for in the latter case the vendor evidently affirms that his property possesses qualities that it does not-

It has been adjudged that a false affirmation of qualities in property sold, tho' made by a person not interested in the contract, is a sufficient ground for an action of fraud-

It is laid down as a rule of law, that unreasonableness alone in a contract, is not sufficient to warrant the interfe-

Remarks.

(a) Answer – It is now decided that negotiable securities are valid by assignment, except where the statute says expressly that they shall be void to all intents & purposes.

Salk. 449.
1 Vern. 465.
2 Burrow. Ch. 167 –
1 Bro. 149, 152.
15 B. 200. 228.

3 Ld. Ro. 551. 4 – " –
166. 1 Vern. 348.
475 – 2 Ver. 375
1 P.W. 496.
3 – " – 75 note
2 Bro. 169. 176.

3 P.Wm. 292.
2 Ver. 159 2 Bro.
163 ——

1 P.W. 496.
P. Ch. 522.
Royd –

1 Vern 167.
2 – " – 14.
1 P.W. 310 –

1 P.W. 118. 3 – "
– 192. 2 Ver.
159. 2 Bro. 182.

Contracts.

=ance of Chancery; but that if the unreasonableness be such as to af=ford evidence of fraud, Chancery can relieve – Mr Reeve however supposes, that unreasonableness alone is sometimes a ground for the interpenance of Chancery – Quere –

An undue advantage taken of one's situation, undoubted=ly founds a claim for relief in Chancery –

Contracts operating as frauds, or impositions, on third persons, are totally void, even as to the contracting parties them=selves – Salk. 156 –

Fraudulent contracts not effecting third persons, may be ratified by a subsequent agreement; for if the party originally cheated will when acquainted with his rights, and when under no restra=int, confirm a disadvantageous contract; it must be charged to his own folly –

Marriage brokage bonds, and fraudulent bonds in general, gain no validity by assignment – Quere, how is the law respecting negotiable securities? (a)

Contracts for the expectancies of young Heirs, are considered in Chancery as intrinsically corrupt, tho' it was for=merly the practice, to inquire into the fairness of the Contract.

Yet such contracts may be ratified, notwithstan==ding, by the heir, after he comes into possession of the estate, and if at the time of making the ratification he understood

Remarks.

3 P. Wms. 220.

1 Leo. 68.

Holt. 266.

Contracts

his rights, and no advantage was taken of his situation, he will be bound.

If however at the time of ratifying the contract, the the heir did not act freely, or were ignorant of his rights, and he is not bound by his ratification –

A contract perfectly nugatory is void, and if money has been paid upon such contract, it may be recovered as having been paid without consideration –

Contracts obtained by Duress.

All contracts ~~or~~ securities obtained by duress, may be ~~pleaded~~ avoided by pleading the duress specially –

Duress is of two kinds, Duress by imprisonment, & Duress per minas,

A contract entered into by a man unlawfully im=prisoned, may be avoided –

But if a man be by due course of law arrested, and imprisoned, on mesne process, which was apparently groundless and given a bond to procure a discharge from prison: it seems that such a bond tho' inequitably obtained, and voidable, in chancery, is not voidable at law, on the ground of duress, for the process of imprisonment ~~and~~ is strictly speaking ~~void~~ legal –

Remarks

1 Bl. 10 Mod.
2 Ld. 9 Kin. 317.

Cro. J. 187—

Quin. 319. Sid.
122. Sd. Ray.
327—

5 Rep. 119—

2 Saw. 189.
1 Vin. 19.
1 Atk. 11—

Contracts.

Threats to destroy property, or commit a battery, not amounting to mayhem, do not constitute duress so as to avoid a contract. This rule is questioned.

It has been considered as a rule that duress to render a contract voidable, must be imposed upon the person himself who enters into the contract.

But duress imposed on a wife may render a contract void, entered into by the husband, by being specially pleaded, and vice versa. The reason which Finch assigns in support of this rule, is, that husband and wife being but one person, of course when the wife is imprisoned or otherwise put under duress, the husband is also personally imprisoned.

In some cases also duress imposed on a son and daughter, or other near relatives, has been adjudged sufficient to avoid a contract.

But as to this point, authorities are contradictory.

Duress must be pleaded specially, in order to avoid a speciatty, and cannot be given under the general issue of non est factum tho' under non est. it may.

In case of undue influence, tho' not amounting to duress, Chancery will rescind the contract; but it is otherwise if the contract be reasonable, and the influence such only as arose from due remonstrance and ness:

Remarks.

1 Bac. 72.
1 Bac. 269.
3 Bl.

2

1 Bac. 270.
1 Bac. 72.
3 Bl. ——

Contracts.

-pect.

The ratification of a contract obtained by duress, must in order to be binding have been made freely, and without any undue influence — practice —

Contracts required to be written.

The Com. Law distinction between special and simple contracts, ~~and~~ explained under an other head —

There is also a distinction between written, and unwritten contracts, introduced in certain cases by the stat. of Frauds and Perjuries, enacted 29th Ch. II.d

Under the stat. of Frauds and Perjuries, the following contracts or agreements will not support an action or suit in Law or Equity, unless the contract be or agreement be in writing, or some note ~~of~~ or memorandum ~~thereof~~ thereof, is in writing, signed by the party to be charged, or by some other person, by him thereunto legally authorized —

I. A promise by an Admr or Exr to answer out of his ~~own estate~~ for any debt or duty of his testator, or intestate; that is, such a promise not in writing, does not bind him in his private capacity —

Remarks.

7th, Promises by one to answer for the debt of another.

2 p. 20 –

Contracts.

III. Promises upon ~~condition of marriage~~ consideration of marriage.

IV. Sales of lands, tenements, hereditaments, or any contracts for the sale of any interest in or concerning them.

V. Contracts not to be performed in one year from the time of making them. *

There is a clause in the stat. relating to contracts for the sale of goods &c of the value of £10, which is not ~~matter~~ material in this country.

By the Eng. stat. all parol sales or leases of lands, tenements, or hereditaments, or of any interest in them, it was formerly holden operated as leases or estates at will only, except leases for a term ~~exceeding~~ not exceeding 34 years, reserving a rent two thirds of the improved value, but it has been lately been determined that such leases enure as tenancies from year to year.

By the stat. 2 George 2. an action of Ind. Clpt. lies on a parol demise.

The ~~action~~ object of the stat. of F. & P. was to prevent persons from proving agreements of the above discription, by parol evidence, it being supposed that there was danger of fraud and perjury in doing it.

Remarks.

1 Ver. 126.
Cow. 284 - or
284 —

Ono. Al. 91 — —

5 T. Ro. 690.
Cow. 284.

1 T. Ro. 692. 5 —
6. 7 n 453 —

7 T. Ro. 453.

Contracts

Qualifications of the foregoing rules –

II. Promises by Ex^tx. and Admin^trx.

If the Ex^tx. or Adm^tx. have assets sufficient to an=swer for the debts, or duties of his testator or intestate, his parol promise shall bind him –

Assets constitute a consideration advantageous to himself, so as to transfer the duty to him personally.

But proof of sufficiency of assets, will not raise an implied promise to charge the Ex^tx. be personally, tho' a contrary opinion was advanced by Ld. Kenyon.

The Adm^tx. submitting a claim against him to arbitrament, was once holden obiter to be admissions of suffi=cient assets. But this opinion is now properly overruled, for the Adm^tx. may be desirous of ascertaining the existence or am=ount of the claim, without knowing whether he has assets.

But if on such submission the arbitrators award that the Adm^tx. shall pay a certain sum, he cannot afterwards deny assets to that amount against the ~~other~~ creditor; indeed the award is equivalent to a finding of assets to that amount.

The same rules hold as to Ex^trx. It was once holden that the payment of interest was an admission of

Remarks.

5 T. R. 8.

7 T. R. 350. note

Ld. Ray. 1087.
Cow. 227.
1 Wil. 306.
Esp. 101. 2.
Burr. 1888.

assets by the Exr. to the amount of the principal; or rather that the onus probandi is thrown on the Executor –

But this rule was planely unreasonable, for if there be not assets it would be heard because the Exr. had paid a part out of his own pocket, he should therefore be liable to pay the whole; It has been overruled by later authorities.

Tho' the promise by the Exr. be in writing, he is not bound unless some sufficient consideration be proved. The promise is a simple contract only. The object of the statute is not to make the Exr. liable at all events when the promise is in writing, but only in those cases in which before the stat. he would be bound on a parol promise –

III. Promises by one to answer for the debt of another –

Under this clause ~~to the stat~~ of the stat. this general distinction is to be taken.

If the promise made for the benefit of an other be <u>original</u>, it is binding tho' by parol; but if it be <u>collateral</u>, it is not binding.

A promise is said to be <u>original</u>, first, when the third person, for whose benefit it is made, is not liable at all to the promisee, so that there is ~~not debt~~ no debt due on his part

Remarks.

5 Mod. 205.
1 Wil. 306. 2 –
– 94. 2 d. Ray.
1088. 6 Salk.
27. Esp. 101. 2.

2 T. Ro. 81. 1 Th. Bl.
120. 2 d. Ray.
1087 ——

Cow. 227.
1 Th. Bl. 120.
2 d. Ray. 1386
or 1386
Salk. 28. Esp.
102 ——

Salk. 28. 2 T. Ro.
80. 1.

Cow. 228. 9.

Contracts

And secondly, where his liability is extinguished on the promise being made, such a promise is out of the statute.

But when the promise is merely in ~~ad~~ aid of a subsis=ting or a continuing liability on the part of such third person, or to procure credit for him: that is, when the promise is inten=ded to furnish an additional remedy, it is collatteral and with=in the stat.

The above distinction is supported by the current of autho=rities. Thus if A. say to a Merchant, deliver goods to T. Brace and charge them to me" or "deliver them on my account" or "deliver them, I shall pay you" the promise ~~the promise~~ is orig=inal; for T. Brace is not liable at all, A. is the original ~~is not liable at all~~ the debtor. But if A. say "deliver goods to M. T. & if he do not pay you, I will" it is collatteral, hence the in=tent is, that the charge should be in the first instance a=gainst the reciever.

So when it was said "supply my mother in Law with bread, and I will see you paid" the promise was holden to be collateral. Because of the intent as in the last case, that the reciever should be liable in the first place — Ld. Mansfield once held that such a promise before the de=livery of the property, was origenal, there being then noli=ability on third persons. But this opinion is overruled

Remarks.

2 Ph. 40. or 80.
Exp. 101. 102.

1 Salk. 273—
— 12. 6 Mod.
248. 2 L. Ry.
1085. Bob. 606.
1 Bac. 756—

2 L. Ry. 1098
or 88

Burr. 1886.

7 T. R. 204.
1 Will. 94—

Contracts.

So if one had said "if you dont know J.B. you know me, and I will see you paid" the promise was holden to be collat=eral J.B. being first to be charged.

So a promise by me, that in consideration of your let=ting a horse to J.B. he shall be deliver him, is cottateral. this is undertaking to answer for the defautt of an other to prouve him credit —

And it may be said down as a general rule; that a promise that a third person shall do an act, for not doing wheeh, he would be liable is cottateral —

A promise in consideration that the promisee will extinguish a debt against a third person, is original, it not being in aid of a con=tinuing liability in the third person, or to obtain credit for him, as when one said buy U. Thweets bond and I will see you paid —

So in Bua Williams vs. Leiper, when the landlord caus to distrain J.B.'s goods for rent, the deft. to whom they had been assigned promised to pay the rent, if the Pltff. would not distrain; the promise was holden good tho' the tenant J.B. remained liable.

The Pltff had a lien which he gave up in favor of the defendant on his promise to pay —

A promise to pay a ~~written~~ certain sum in consideration in consideration of the Pltff. withdrawing a suit against J.B. for assautt and battery, was holden original. There no debt was

Remarks.

2 Wil. 94.
Burr. 1887.
7 T. R. 201.
2 H. Bl. 812.

3 Bl.

Burr. 2482.
1 T. R. 357.
6-11-526.
7-11-421.

Burr. 1887.

due from J.B., and it did not appear that there was any Se in him.

But a promise to pay in consideration of the promisee staying a suit brought against J.B. for debt, in cottateral, for the debt still subsisted against J.B. and no lien is taken away. Yet if this promise had been in consideration of the promisee withhaving, it is a question whether it would be good or not, since a detrapit disables the Pltf. from bringing an other suit, so that J.B.'s liability is extinguished —

A promise to pay A.B.'s debt if the Pltf. would discharge A.B. taken on mesne process, is cottateral I suppose, for the debt continues, and A.B. may be arrested again, yet if A.B. should in this case escape, so that the sheriff could not retake him, the promise would be binding —

Yet this rule would not hold I conclude, if A.B. had been taken on final process, and thus released, for in this case releasing would discharge the debt.

Some have supposed when there arose a new consideration, a promise to answer for the debt Se of an other is good. L.d. Mansfield once held this opinion, but afterwards acknowledged it to be unsound; and certainly it is not law, for as the original promise continues or rather cause of action the promise, is cottateral. Mr Reeve maintains that if such promises be out of the statute, almost every parol prom

Remarks.

Ray. 450.
B. M. R. 249.
1 Bac. 75. Dun.
1690 ———

12 Mod. 540.
4 Bac 645.
B. M. R. 249.
Ray. 450 —

7 T. R. 201. 4
204 — — —

-ise to answer for the debt or do of an other, would be established; & that the provisions of that part of the stat. would be abolished.

A written promise to pay the debt of another, if he do not, is discharged by the promisee's granting forbearance to the debtor, for by this act the promisee makes a new contract with the debtor, and of course takes the risk upon himself -

When according to the above rule the promises must be binding only when they are written; it is not necessary in declaring, to aver that it was in writing it is sufficient if it appear in evidence -

This rule holds as to all contracts contemplated by the stat.

But if the promise be pleaded in bar of an other action, it must be shown or averred to be in writing, for in order to be an effectual bar, it must appear to be such a contract as will support an action -

A parol contract to pay the debt of an other, and also to do some other thing, is void in toto, because if one part of an entire contract be void the whole is also void -

III. Agreements in consideration of marriage.

This clause of the stat. relates not to promises to marry;

Remarks_

B. N. P. 280.
1 Fonb. 179.

1 Pow. 277. 8.
1 P. W. 618.
P. Ch. 526—

1 Pow. 279.
2 Vl. 1 Ch. car
135. P. Ch. 402.
8 Atk. 504.

2 Prow. Ch. 28.
1 Fonb. 179.
1 Pow. 287. 8

1 Fonb. 179.
1 Pow. 287. a
2 3 Ch. 2 P. W. 65
1 Pow. 270.
9 Mod. 3—

1 Fonb. 198.

1 Fonb. 179.

Contracts.

there are good tho' by parol tho' by parol. It relates only to agreements in consideration of marriage, that is, such as are in contemplation of marriage, by way of marriage settlements, or family provision: There to bind must be written.

There are no exceptions to this rule, except in cases of part ~~payment~~ performance, of which hereafter.

It was formerly doubted whether a parol agreement ~~was~~ would not be good, if it should stipulate ~~that it should be stipulated~~ that it should be reduced to writing, but such stipulation it seems makes no difference, at least does not take the case out of the stat.

A letter signed by one party, is a writing within the statute. 1 Bro. Ch. 504 1 Ves. 202. 2-11-322.

But it must appear that the other party accepted the terms, contained in the letter and acted in contemplation of them in proceeding to marry, otherwise they are not binding*; Thus, when the party to whom the letter was sent, was ignorant of the promises in it, at the time of the marriage, performance was not decreed.

So when A. wrote a letter to his daughter containing a promise of a settlement on her intended husband, which was not shown to the latter.

In these cases there is no agreement, the minds

Remarks.

P. Ch. 560.
Stra. 426.
1 Atk. 12 —

1 Atk. 12.

1 Pow. 279. 283.
1 Vern. 151. 159.
1 Eq. ca. 19

1 P. W. 770.
1 Vern. 221.
P. Ch. 402.

Kirby 22.

J. Court
1800 —

of the parties have never met.

A letter also in order to be a sufficient agreement, must furnish distinctly the terms of the agreement; or it must at least ~~refer~~ refer to some written agreement or instrument in which the terms are set forth.

IV. Contracts for the sale of lands &c.

It was formerly doubted as under the last head, whether a parol contract would not bind if it were part of the agreement that it should be written.

But it is now settled that this makes no difference 1 Bro. Chancr. Pa. cas. 43. 2 Brown. Ch. 565.

It was once decided in Connecticut, that a parol agreement by the grantor at the time of the granting to pay for a deficiency in the supposed contract, was within the statute. But a contrary decision has since been had and reversed in the ~~supreme~~ supreme court of Error.

The nature of such agreements are good under the statute if they are provable consistently with the spirit of the act and the rules of evidence.

There is no inherent inhibitity in a parol contract the difficulty lies in the proof. The statute merely introduces a new rule of evidence to prevent fraud and

Remarks.

Bl. Rep. 601. 1 Pow
291. 292. 1 Ves.
221. 461.
Pre. Ch. 208.
374 ——
2 Atk. 100.
155. 3 — 11 — 2.
Bl. Rep. 600.
2 Bro. Ch. 56th
Amb. 586.
1 Pow. 292 —

P. Ch. 208.

3 Atk. 2.

2 Atk. 156.
2 Bro. Ch. 56th

Bl. Rep. 600.

perjuries.

It is a rule of construction, that statutes like these against frauds are to be liberally expounded, that is they are to be expounded when they act upon the offence by setting aside the transaction.

It. Where there is no danger of fraud or perjury in enforcing the agreement, the case is not within the spirit of the act; thus on filing a bill for a specific performance, if the Deft. in his answer confesses the agreement, it is binding, for there is no danger of fraud in acting on such proof.

It is a question as to the example put, whether the Deft. tho' he admits the agreement, if he insists on the stat. by plea, the agreement can be enforced.

In Atkins it is laid down that Chancery would decree it tho' the Deft. had insisted on not performing it.

× In the case in the 2 Atk. the Deft. did insist on the statute by pleading; yet he having confessed the plea in his answer, the plea was overruled and the agreement decreed.

In Blackstone's Rep. the rule is laid down generally, that an agreement confessed is out of the statute. A contrary decision has been had at law, i.e. it has been decided, that if the Deft. having confessed the agreement

Remarks.

2 W. M. 63.

2 Bro. Ch. 569.
6 Bro. P. C. 45—

1 Fonb. 170.
1 Bro. Ch. 569.

2 Bro. Ch. 566.

1 Bro. Ch. 569.
1 Fonb. 170.

Contracts.

by answer in Chancery, & insists on the stat. he is not liable on the agreement. This decision plainly militates against with those in Chancery notwithstanding there are weighty opinions to the contrary; for this is altogether a question of construction, about which the same rules prevail both in Chancery and at law; So in Brown's Chan, the plea of the stat. was ~~used~~ allowed, tho' the agreement was confessed, or rather not denied; But this decision was on the special circumstances of the case. The agreement was incomplete: only general heads, by way of illustration or instructions to an attorney.

It remains therefore questio vexatia. If insisting on the statute prevents a remedy on the agreement when confessed, the rule itself, that confession on the answer, takes the agreement out of the stat. seems nugatory, because no agreement can be enforced under it, unless the Deft. is willing it should be.

It is also an unsettled question, whether a Deft. in Chan. on a bill for specific performance of a parol agreement for the sale of lands he is bound, either to confess or deny it in his answer.

This question was decided by Ld. Mansfield in the affirmative — that is he was obliged to do one or the other.

Lord Thurlow was of the same opinion and held that the only effect of the stat. as to proof of the agreement, was to prevent the Deft. from proving by other evidence, or that if

Remarks.

2 H. Bl. 68.

1 Fonb. 170. 1.

1 Pow. 292.
3 Atk. 407.

1 Pow. 271.
1 H. Bl. 289.
Wes. 218.
221. 1 Bro. Ch.
304 ———

Contracts.

the Deft. denies it the Pltff. cannot prove it by parol.

Sd. Loughborough is of a different opinion, because com=pelling the Deft. to answer a parol agreement, lays him under a temtation to commit perjury.

If he is bound to confess, or deny, it seems to follow that his confession takes the agreement out of the stat, and that insisting on the stat. will not avail him.

It has been holden that a party to a parol agreement for the sale of land &c, tho' he denies the agreement by answer, shall be bound by it, if a previous confession out of Court can be proved.

Upon the above principle. Viz. that there is no danger of fraud, or perjury, a parol contract for the pur=chase of lands at a vendue sale, before a master, in Chancery, under the order of the court, is binding.

Here the sale is a judicial one, and is proved by the entry of the master in Chancery under the order of the court. And hence in contemplation of law, there can be no danger of fraud, or perjury, since full evidence is given to the law by the law to the affairs of the court officers of the court.

Again according to the authorities, a parol contract re=specting an interest in lands &c, if inferable from circumstantial facts, in proving which there is no danger of fraud or perjury is

Remarks.

Pow. m. 65—
3 Wood. 469. 2
Ves. 376. 3 Atk.
2 71. Rob. 576.
2 Talb. 60. 2 Ven.
2 494. 1 P. Wms. 381
2 or 331.
2—11—549.
2 1 Vent. 105.

Bl. R. 600.

Bl. R. 600.
1 Pow. 294.
296. 1 Toub.
171. 172 —

1 Toub. 172.
1 Pow. 296. Ve
Bl. R. 600.

1 Ves. 83. 221.
297. 1 Wm.
159. 363.
2—11—373.
619. Stra.
783. 2 Atk.
100. 1 Bac. 74.

binding. Thus, if there be a sale of lands by absolute deed; but the ven=dor at the execution gives obligations to the vendee, to the exact a=mount of the consideration: remains in possession, pays the tax=es, does not account for the rents and profits, and pays inte=rest: From these facts, a trust is implied for the vendor, that is he is considered as mortgagee by virtue of an implied ~~agreement~~ parol agreement.

This seems to be a reasonable exception to the gene=ral rule, for the mode of proof is not inconsistent with the spi=rit of the statute, that is it does not invite perjury.

2d. Other exceptions to the stat: are admitted on the ground, that an act made to prevent fraud, ought not to receive such a construction, as would protect and encourage it.

So when a party by not performing a parol agreement, will practice a greater fraud on the other, than would result from the mere breach of the agreement itself, he is generally holden to it in Chancery.

Therefore a parol agreement performed, or partly performed, on one side, at the request, or consent of the other, will bind the latter. Thus A. lease to B. for 20 years, and B. enters under the lease and begins to build, or incur expense in improvement, the contract will be enforced in Chancery. Otherwise A. would take advantage of his own fraud.

Remarks.

Eq. cas. 17. 48.
3 Vern. 523.
1 Pow. 297. —

1 Pow. 299. 300.
2 Vern. 246
363 — 455.
2 Equ. cas. 48.
2 Bro. P. ca. 102.

1 Pow. 302. 1 Vern.
365. 2 — 1 — 363 —

1 Pow. 304. 5.
5 Vern. 523.
3 Atk 2. 1 Ves.
83. 222. 1 Bro.
64. 1 Pow. 175.

1 Pow. 175.
P. Ch. 560.
2 Eq. ca. 4 —

1 Pow. 308.

Contracts.

In such case the agreement has been enforced, tho' the terms of it have not been precisely settled by the parties.

Delivering possession of land in pursuance of a parol agreement, is a sufficient part performance.

And taking possession under the agreement, it seems is deemed sufficient notice to a subsequent purchaser, and the parol agreement will hold against him.

So the payment of money under a parol agreement, has been holden such a part performance, as to take the agreement out of the stat.

This rule has been questioned but finally settled by Sd. Hardwicke.

Two or three cases have, however, been objected to the rule, when on a parol agreement for a purchase, and a lease of land, money was paid as earnest. But these cases do not effect the rule, for here the money paid, was not in part performance of the agreement, or subsequent to the agreement but was a mere solemnity, in making the contract, a form in stipulating.

In this case, damages may be recovered at law, for non performance.

It has been questioned also whether the receipt of the money, in part performance may be proved by parol.

Remarks.

Atk 4 –

1 Pow. 307. 8.

1 Pow. & 309.
3 Atk. 2. Fonb.
300 –

1 Pow. 309.
1 Bac. 74.
3 Atk. 4.

P. Ch. 561. 1 Fon.
173. 1 Ono. Ch.
402. 1 Atk. 12.
6 Bro. Ch. P.
cas. 45 ——

1 Pow. 309.
1 Bac. 74.
P. Ch. 561.
Stra. 738. a
733. —

Contracts.

If not, the rule itself that the payment of money is sufficient part payment, is idle; for if the payment cannot be evidenced, without a writing counting on the agreement, the contract will no longer rest on parol.

In one case decided by Lord Hardwicke, the payment was proved by parol.

And Powel who treats the rule as questionable, maintains that parol proof of the payment of money, may be admitted, because the payment is merely a collateral fact.

A parol agreement in part performance, will be decreed against the Heir of the party, in whose favor the part performance was.

But the act claimed to have been done in part performance, must to take the agreement out of the stat: be such, as in the opinion of the court would not have been done but with a view to perform the agreement, otherwise it affords no presumptive evidence of the agreement.

Marriage is not of itself considered as part performance of a parol contract, in consideration of marriage, for by the terms of such contracts, they are not to have effect unless the marriage takes place.

To consider marriage then as a part performance, would take every case out of the stat: and leave the contract

Remarks.

The sale of Timber trees good by parol — 1 Bro. 179. 298.
The sale of sand gravel stone clay or ore — 299. 309. 2 Ven. 373. 2 Bro. 204.
good by parol. the general rule is that whatever is sold with a view to removal is good by parol
a sale of an house standing or stand of to be removed is good — a crop of grass growing — 1 Bro. 304. 1 Ver. 297 —

1 Bro. 304.
2 Eq. ca. 29.

2 Atk. 203.
3 — 11 — 389.
1 Bro. 188.
1 P. W. 620 —

1 Eq. ca. 20.
1 Bro. 294.

1 Ver. 457. 2 — 11 —
376. 2 Atk. 203.
3 — 11 — 389 —

1 Ver. 299.
1 Vern. 240.
1 Bro. 294.

Contracts.

n at Com. Law.

But it is said a parol contract in consideration of mar=
=riage, by third persons as a father to one of the parties, is taken out of the stat. by marriage, it being with his consent, otherwise a fraud would be practised on the parties.

So when the wife was allowed by the husband dur=
=ing coverture, to receive the interest of a certain sum of mo=
=ney, which the husband before marriage agreed to settle to the wifes seperate use; the agreement was held being binding on the ground of part ~~pay~~ performance.

So cutting down timber in pursuance of a marriage agreement, was holden a sufficient part performance.

Upon the same principle to prevent fraud, even a written contract respecting an interest in lands, or any other subject may be contradicted, by proving the parol agre=
=ment, if there was fraud in the execution of the instrument.

The same may be done in case of a mistake in ~~case of~~ the execution. 1 Pow. 433. 6 T. R. 671. 1 Fonb. 184. 193.

Thus if A. agrees to settle £1000 on B. and by mistake £100 is inserted, the parol contract may be proved, for the minds of the parties never met in executing the written agreement.

So a written agreement respecting an interest in lands, may be controlled by parol one to rebut an equity. An equity is a right

Remarks.

Esp. 20. 165.
Bl. Ro. 1219.
1 T. Ro. 378.
1 Wil. 314 –
1 H. Bl. 235.

Legal
Legal common law was good & would recover in the
action was debt

after the Statute
leases by parol continue the agreement is to be binding for
not binding upon lessee it can be no more than a
lease at will then comes the Stat. of George 2d, as
case of such lease is actual occupation. the
lessee may sue in an action & the rent again
on as proved the principle

Esp. 2 6. Hat.
24.

Esp. 20. 21.
1 T. Ro. 378. –

Contracts.

merely equitable.

To rebut, means to oppose, to combat, and this rule tho' it be a rule of evidence, is peculiar to equity; for a court of law knows nothing of a mere equitable right.

By stat. 11th Geo. II Ind. Apt. for use and occupation lies on a parol use: and the agreement as to the rent, may be given in evidence to ascertain the damages.

At Com. Law Apt. would not lie for rent tho' debt would.

But in order to sustain the action of Apt. the Deft. must have occupied with the consent of the Pltf. for if the possession have been tortious or adverse, the idea of a promise is excluded,

V. Contracts not to be performed within one year from the making.

Under this clause of the stat. a promise by parol to pay a certain sum of money or do a certain act, two years hence is void.

It has been holden that this clause of the stat. does not extend to any agreements concerning lands or tenements: because I suppose the preceding clause has made all the provisions intended to be made as to contracts of this kind.

Remarks.

1 Bow. 276.
1 Ven. 155.

Salk. 280.
B. & P. 280.
Stra. 506.
Burr. 1278.
Ld. Ray. 316.
317. 367. 3 Salk.
9. Mod. 326.

Bul. N. P. 280.
Burr. 1278.

Ld. Ray. 317.
Burr. 1281.

Burrows
1281 ——

1 Bro. 370.
Beat. Bl. R.
600. 1 Fox. 22.
3 Bl. 4 ——

Contracts.

I conclude then that a parol agreement of this kind confirmed or partly executed is binding.

When the performance is to take place on a contingent event, which may or may not happen within a year, the agreement is not within the stat. and not binding.

Thus a promise to pay a sum of money on the return of a ship or on the marriage is binding by parol.

So a promise to leave a sum of money to the promisee is binding by will; for in the eye of the law the death of the person is such a contingent event as may happen within a year.

And to make the contract binding, there is no need of the contingency's really happening within a year for the contract is good or not ab initio.

This clause then extends only to contracts which according to their express terms are not to be performed within a year.

Rules applying to all or several of the different Contracts contemplated by the stat.

The construction of this stat. is the same both in equity and law, tho' the remedy or relief may be different. These rules apply to the construction of all statutes; for the intention of the Legislature governs both in Equity and at Law, and the construction

Remarks

1 Fon. 179.
1 Pow. 287. 8.
2 Bro. Ch. 32.
3 — 11 — 318.
1 Ves. 201.
2 — 11 — 322 —

1 Fon. 179.
1 Pow. 290.
P. Ch. 560.
Stra. 426.
1 Atk. 12.

Fon. 179.
2 P. W. 85.
1 Pow. 287. 8.
9. 2 Mod. 3.
5 Ves 527.
Bl. R. 599.
Bro. 192

1 Eq ca. 32.
1 Wils. 118.
1 Ves. 6. 3 Atk.
519. 1 Pow.
283. 1 Fon.
167. Esp. 23.
Stra. 399.
2d Ry.
1976.

Contracts.

is merely the discovery of that intention —

A question may arise respecting the import of the word "note or memorandum" used in the stat. I suppose that any writing which is intend to furnish evidence of the contract is a note or memo=randum within the stat. for evidently no particular form of words is necessary; Thus a letter written by one party is a suf==ficient "note or memorandum"

But such a letter must sufficiently or rather distinctly furnish the terms of the agreement otherwise it is not binding. This rule holds in every case of a writing whether a letter or note.

It must also appear that the other party accepted the terms and acted upon the offer, otherwise there is no agreement —

So an advertisement written or printed by one of the parties and containing the terms is a sufficient note &c on his part.

The stat. also requires that the note &c be signed by the party to be bound &c — A question then arises as to what is a sufficient ~~a~~ signing —

The general rule is, that not only a subscription in the usual form, but the name of the party to be bound, written in any part of the instrument, if intended to give an authenticity to it, is a sufficient signing, provided there be an ~~ac~~ acceptance by the other ~~by the other~~ party, Thus if the agreement be in this man=ner. I C A Brown agree with ~~Geo~~ C. Edwards to sell to him black

Remarks.

1 Fou. 166.
1 P. W. 446.
1 Pow. 285 —

1 Ver. 221.
1 Fou. 165
1 P. W. 470.
1 Fou. 166.
1 Pow. 284.

1 Ver. 6. 1 Wls.
318. 1 Pow. 284.

acc. &c; the name of A B Esqre written in the body of the instrument is sufficient—

But when the name written in the body of the instrument is not sufficient to give authenticity to it, it is no sufficient signing. Thus if A. having agreed to lease to B. by parol wrote instructions for drawing the lease in these words "The lease to be renewd, A to pay layer &c", this is no signing by ~~the~~ A. for A's name was inserted merely to explain the stipulation and not to authenticate the agreement—

It seems formerly to have been supposed that some partier making alteration with his own hand in the draught of the argument, was a sufficient signing but this opinion is now overruled—

But signing the writting as a subscribing witness, the signee knowing the contents of it, is a sufficient signing to bind him to any stipulation ~~granted~~ recited in the writing on his part—

Thus where marriage articles ~~writing~~ ~~weighing~~ that the mother of one of the parties had agreed to advance £100 as a portion &c were signed by her as a witness she was holden to be bound tho' not a party: for the signing was intended to give authenticity to the articles—

Again the stat. requires that "the note &c be

Remarks

1 Pow. 86. 2 Ter.
378. 1 Eq. ca. 2 c.

1 Pow. 287.
2 Equ. cap. 10.
21. 2 Chr. ca.
164.

B. N. P. 280.
Ol. K. 599.
Burn. 1921.
& T. K. 151.

B. N. P. 280.
Ol. K. 600.
Burn. 1921.

TT. K. 201,

Contracts.

be signed by the party to be bound, or some other person by him thereunto legally authorized." The question then arises, who must sign?

It is sufficient if the party against whom the suit is brought have signed tho' the other party have not if he has had evidence in his power of the acquiescence of the other.

Thus if A. drew an agreement and procured B. to sign it, tho' he does not himself B. is bound.

In the last case A. is also bound, for procuring B. to sign, made B's subscription a signing authorized by A. and a signing procured by one party, is equivalent, to a signing by his agent.

So also an Auctioneer's subscribing the name of the highest bidder, to the conditions of the sale is a sufficient signing for both parties: For in this he acts subscribing, he acts he acts as agent for both parties.

It has indeed been doubted whether sales by public auction are contemplated by the stat. at all, the sale being public so that there can be no danger of fraud and perjury.

If part of an entire contract is within the stat. the whole is: for an entire contract cannot be severed since each part is in consideration of some other part, and since therefore if courts enforce one part only they would virtually make a new contract.

Remarks.

1 Pow. 413.

1 Pow. 416. Cro. Cl. 384. 3 Mod. 44—

2 Bro. P. ca. 116. 1 Pow. ~~418~~ 413. 421——

2 P. Wm. 82.

1 Pow. 218. 243. 2 T. R. 104. 6 Ro. 45. Cro. J. 579. Cro. C. 817—

2 Bro. P. ca. 259. 1 Pow. 444. 5. 8 Mod. 51.. 2 Pow. 91. Ve. 65.

Contracts.

Contracts made void by the act of the parties.

Before a right of recovery is had, or is attached: The parties may rescind their contracts by mutually expressing their dissent in presence of witnesses.

But after a right of recovery has attached the contract cannot be rescinded by a mere agreement. There must be a release, acquittance, or discharge.

A waiver of a contract on one or both sides, may be enforced from a long continued neglect to claim the benefit of it.

A right to a penalty of a bond &c may be waived by accepting that for which the penalty was a security.

If a wife suffer her separate property to be used in her husbands family and neglects to charge it she cannot afterwards claim a compensation for it.

A contract of a lower may be merged in one of a higher nature, but one contract cannot be merged in one of ~~a higher degree~~ an equal degree.

When the rights & obligation arising out of a contract unite in one person, the contract is annulled.

Contracts may be annulled by ex post facto laws.

By full performance of a contract be rendered

Remarks.

Esp. B. Ins.
407. 4 Bl.
4 T. R. 181—

1 Pow. 235.
2 Bl. —

2 Pow. 235.
2 Bl.

1 T. R. 705. 6.
Mor. 128. Cro.
El. 33. 486—

Contracts.

absolutely impracticable by a legislative act, part performance if practicable, and required by the obligee, will be enforced by equity.

If the purchaser pay the consideration and the vendor refuse to deliver the property according to the contract, the former may recover back his money by Ind. Asst., thus dis=affirming the contract.

Contracts Executory and Executed.

Contracts executory convey no present interest, but the parties mutually trust each other.

Thus if each one agrees to sell, the contract is ~~executed~~ executory and a chose in action only is conveyed.

Contracts executed are those by which the parties mutually transfer their rights to each other and effect a change of property, either immediately or on the happen=ing of some event, which does not depend on either of the parties and in this case a chose in possession is con=veyed.

A contract containing words of present ~~contract~~ interest, but ~~provided~~ providing that a lease that a lease shall be executed in future is merely an agreement

Remarks.

1 Bac. Abr. 9.
Doug. 201. Esp.
597. Bna. 965.

Contracts.

for a lease not a lease itself tho' it contain a stipulation that the lessee shall take immediate possession.

The maxim that to every contract there must be a consideration applies in its full extent only to Executory contracts. A gift delivered is good it seems.

An Executory contract under seal, is good it is said, without a consideration can be shewn, nominal damages only can be recovered on such a contract. And if a consideration be acknowledged still if the want of consideration can be shewn from the tenure of the contract itself or by other written documents nominal damages only can be recovered.

A deed of land for which there is apparently no consideration, formerly inured to the use of the grantor but this rule of law goes upon the presumption that in cases of this kind, no conveyance was intended.

This rule has not been adhered to in Eng. since the stat. of frauds, as parol agreements, which the rule presumes respecting lands are made void by stat. But if the use was declared to be to a third person it was good without a consideration. If A. in consideration of £1000. received of B, grant an estate to B. and in writing declares the use to C. such declaration of the use is good and was formerly good by parol.

Remarks.

1 Pow. 368. Cro.
2. 819. 7 Co 40.
1 Lev. 170. Mod.
504. 570.
1 Pow. 332—

Contracts

A grant merely operative voluntary is operative and binding if the deed be delivered –

A deed of land delivered is ~~merely~~ considered a con=tract ~~deli~~ executed. And a consideration not being necessary to support an executed contract; the fact of the delivery is the only thing requisite to the validity of such a deed, Whether there was or was not a consideration is an enquiry totally immaterial –

A penal bond for the payment of money, if act=ually delivered is good without a consideration; such a bond being in contemplation of law, the same as pay=ment of money. Therefore a contract executed is binding even if it apear upon the face of a bond that there was no consideration. The delivery and not the consideration being in this as in all executed contracts, the only mate=rial enquiry –

A single bill was not formerly considered as con=tract executed but a mere promise under seal the con=sideration of which might be enquired into –

A release is also a contract executed – A pe=nal bond has always acknowlagement of present indebt==edness a single bill formerly did not, tho' it now does –

If a contract executory be under seal, the con=

Remarks.

1 Pow. 341.
1 Fonb. 326.
338—

Cro. El. 67.
150. Cro. El.
70.

Cro. El. 348.
Esp. 95.

Contracts.

=ideration cannot be enquired into except by written documents. A sealed instrument according to english principles carries with it too strong evidence of a consideration to be rebutted by parol proof: But if it appear from the face of the instrument or from written proof that the executory contract was made without consideration, nothing more than nominal damages can be recovered can be recovered on the contract thoun=der seal.

Thus an agreement under seal to execute a release if made without without a ~~release~~ consideration will subject to nominal damages only tho' a release actually made without consideration is valid.

The words "value received" are not essential in a sealed instrument.

The quantum of consideration is totally immate=rial, if it have any value.

A consideration to be sufficient to support a con=tract must be an existing consideration.

According to some old authorities a promise in consideration of something part is always <u>medum practum</u>, and in some cases the old rule is retained; but when the act done ~~Oport~~ and part, was beneficial to the promisor a subsequent promise in consideration of that

Remarks

2 Bl.

Esp. 95. Cow.
290. 544.
2 T. R. 765.
2 - 1 - 757.
T. Raym 260

2 H. Bl. 257.
Esp. 87. 95.
2 Bl. Cow. 290.
4. B T. R. 757.

Ment. 6. 318.
332. Cplu. 24.
Esp. 222.
676. 7 T. R.
663. 8 Mod.
177. 4 Wm. 15.
3 P W. 95.
B. N. P. 35.

at, is now binding.

Asst. and not Debt lies in those cases. It is said by Judge Blackstone, that a promise founded on a precedent obligation is binding. This proposition tho' true in part is not so in its full extent; for if a feme covert should contract a debt and after her coverture should promise to pay it, her promise tho' clearly founded on a prior moral obligation would not bind her.

The rule with regard to promises founded on prior contract appears to be, that if the original contract out of which the moral obligation arises, and on which the subsequent promise is founded, was in itself utterly void and such as created no liability or remblance of liability the subsequent promise ~~did not bind~~ will not bind the promisor, but if ever there was a colour for a suit the subsequent promise is binding.

A voluntary entry creates no legal obligation, but it is sufficient to support a subsequent promise. 1 Pow. 384.

An action may be brought by one on a promise made by an other. If the promise were for the benefit of the Pltff. A case of this kind has been decided in the Superior Court of Con. where there was no relation between the Pltff. and the Promisee.

Remarks.

1 T. R. 619.

Mod. 854. Ca
Bl. 19 Geo. 2.
685—

1 Roll. 25. 26.
1 Rew. 353. 62

2 Bl.

1 Rew. 330.
2 Bl.

2 Bl. 3 Geo. 83.
1 Rew. 361.
1 Vin. 427.

1. Term. 337.
3 P.W. 322.
389.

Contracts

It has been holden that the right of him (for whose benefit the promise was made) to recover (he not being the promisee) extends only to parol promises therefore if a bond be given to A. for the use of B. the action on the bond must be brought in the name of A.

Forbearance of a suit against the Deft. is a good consideration on which to found a promise. But the forbearance must be total or for a time certain or as it is said, for a reasonable time, of which the court will Judge –

Of the consideration necessary to support a contract –

A contract has already been defined to be an agreement upon sufficient consideration, to do or not to do a particular thing. According to this definition a consideration is the essence of every contract.

A consideration is the material cause of a contract, that on account of which each party is induced to give his assent.

Considerations are of two kinds – Good and Valuable.

I. A good consideration is such as that of kindred a natural affection between near relations –

Such a consideration in contracts is a good consideration where the contract is executed as between the parties. As

Remarks.

1 Eq. ca. 84.
2 Atk. 152.
2 Bl.

1 Pow. 361. g.
1 Vern. 427.
2 P. W. 176.
2 Bl. 3 Co. 89.

2 Bl. 3 Co. 89.
1 Pow. 335. 6.
2 Bl.

where the contract is by parol ~~[illegible]~~ and no consideration is expressed ~~the [illegible]~~ a fact is here - demurrer in working at length, & there appears now the cofe the same a note or any other writing where the contract is not detailed at length. what of it may be averred & proved of one of states which is proof of law is now ~~no~~ demurrer specially - ~~[illegible]~~ you cannot shew the amount of one from the seal imports one but the nature of consideration it is merely presumptive of detailed set length of states of consideration set forth, which is now

Attest in the [illegible]

The cofe of note negotiated in writing to be made the proofs. the cofe of covenant seals claim to be voluntary there is a consideration but on fact the question may be inquired into as a corresponding recovery expected without consideration vests the property the destruction of there being a consideration consideration when it appears it must be advantageous to promisor or disadvantageous to promisee - the cofe of sealed & signed

7 T. R. 354. note -

Co. Lit. 177.
2 Bl.

Contracts.

in a grant by deed, from the father to his son. But as against creditors of the Grantor and bona fide purchasers it is generally deemed voluntary and is set aside.

And an executory contract on such consideration, may be enforced in Chancery in many ways.

II. A valuable consideration consists of something valuable as money, goods, labour, marriage &c.

Contracts on a valuable consideration may be made in either of four ways.

1st By stipulating thus: do ut des, as in case of loans on bonds & promissory notes on a contract expressed or implied to pay.

2d The second species is facio ut facias as where labour or service is to be performed on both sides; or forbearance on one side and some act on the other or mutual forbearance.

3d The third species is facio ut des as where an act is to be performed for reward.

4th The fourth species is, do ut facias which is the counterpart of the last, or the last inverted, as in the case of granting to give something, or of giving something for an act to be done.

Contracts are to be devided into two kinds, Special contracts and Simple contracts.

I. A special contract is one which is entered into or evidenced by speciatty that is, by deed or writing sealed.

Remarks

7 T. R. 354.
note a Bl.

1 Pow. 330. 5.
Salk. 129. Pow.
302. Bog.
1 Fon. 326. 333.
Ed. Ky. 909.
5 T. Ro. 143.
3 Bl.

Burr. 1670.
2 Bl.

1 Pow. 338.
2 — " — 242 —

1 Pow. 341.
Doug. 514.
Kyd. 155.
1 Fonb. 335.
4 Mod. 242.
Stra. 674. 2
T. R. 71. 3 — "
221. — " — 351.
2 Bl. — — —

1 Pow. 232. 3.
348.
Pow. 30 Ro
434. Burr.
1694. 1 Fon.
334.

Contracts.

III. A simple contract is a contract by parol or on writing but not sealed. A contract not sealed and a parol contract being upon the same footing in point of solemnity.

In Com. a seal is not absolutely necessary to constitute a speciatty.—

It is clear that an executory contract by parol is not binding without a consideration, such a contract is medium praesumtum. Thus a promise to give me £ 100, or to labour without a reward is not binding.—

But it is said by Mitmat Justice that a contract in writing is good without consideration at Com. Law.

This proposition Powell considers as not defensible —

In the case put by Blackstone of a promissory note an actual consideration is necessary and must be proved as between the original parties. After the note is negotiated the promisor cannot aver the want of consideration because a third person becomes the holder, and the Law Merchant governs otherwise a fraud might be practised on third persons. Reducing a contract to writing then, does not supersede the necessity of a consideration.—

And I conceive ~~in strictness~~ that in strictness and in judgment of Law, a consideration is necessary to the validity of a sealed instrument or speciatty: tho' first the Pltf. must

Remarks

Hard. 200.
1 Bl. 344.
Id. Ry. 724.
1550.
2 Bl. —

2 T. R. 577.
3 — 438.
7 — 477.
Burr. 1639.

Pow. 341.
342 —

1 Burr. 238.
Doug. 20. 21.
Esp. 574.
Stra. 955.

not prove a consideration, and secondly the Deft. cannot aver the want of it, for from the solemnity of the instrument a considera=tion is implied. If the Deft. might disprove he might contra=dict the deed which cannot be.

If a want of consideration appear upon the face of the specialty I apprehend it is void.

The result then is that on principle a consideration is necessary to the validity of a specialty: but that is binding unless the want of a consideration appears on the instrument or some other instrument of equal solemnity, which is of the contract.

It is laid down by Powell that on voluntary cove==nants under seal only nominal damages will be given at Law. The want of a consideration in the case stated I appre=hend, is not ~~supposed to~~ supposed to appear on the instrument. His meaning then probably is that on the writ of enquiry, the want of consideration may be proved to mitigate damages and not to effect the right of action.

The rule that a consideration is necessary to every con=tract applies in its full extent to executory contracts only. A contract executed by delivery of the subject is good without a consideration as between the parties, as a gift.

A consideration sufficient to support a contract may

Remarks.

Pow. 342. Tom. 336. 1 Com. 149—

1 Vern. 218.
1 Pow. 152.
1 Wil. 230.
2 Ver. 518.

1 Pow. 342.
Esp. 94. Cro. El. 206. 2 Roll. 23—

Pow. 343. Cro. El. 67, 150.
Cro. El. 70.
Dyer. 272.

5 T. R. 373.

Contracts.

arise in two ways 1st From something advantageous to the party promising or undertaking and 2nd From something disadvantageous to the party in whose favor the promise or undertaking is made —

I. The promise arises from something advantageous to the promisor: as if in consideration of selling my house to B. Star to day he promises to pay hereafter —

And in most cases of contracts the consideration arises in this way —

The quantum of consideration is wholly immaterial for the law does not regard proportions it is sufficient if there be any consideration, as a <u>peppercorn</u>.

Idle and insignificant considerations are not deemed considerations, as if I engage to pay a sum of money for a lease <u>at will</u>.

But anything however trifling, to be done by him in whose favor the promise is made is a sufficient consideration. Thus if A. leases to B. B. assigns to C. rent becomes due and C. promises to pay it if A will shew him the lease: Shewing the lease gives A. a right of action against C. on the promise — And it has been holden in the Court of King's Bench in a late case, that the mere relation of Landlord and tenant was a sufficient consideration for a promise by the latter. Thus a declaration stating the Deft to be tenant and that in consideration thereof he promised to my

Remarks.

Hob. 45. 216.
Pow. 344. 8. or
3. Cro. El. 94. 5.
847. 848. Croy.
842. Roll. 22.
Comp. 128.

1 Pow. 348.
Aye. 272.
Pow. 5. 302.
Cro. El. 442.
Pow. Roll. 11.
Esp. 84. 95.
2 Bulr. 73.

I suppose a past consideration — of beneficial do.
the promise for past but a legal duty — the
case of prior moral obligation with the exception
of a express the promise — if past it does not the
request &c

1 Pow. 348. 350.
2 Bulr. 73.
Cro. El. 94.
Cro. El. 409.
3 Salk. 96.

Pow. 350. 1.
1 Roll. R. 413.
1 Leon 409.
T. Ray. 260.
Cro. El. 138.
1 Bl. 190 —

Contracts.

may straw be, was held sufficient.

2d. A consideration arises from something disadvantageous to him in whose favour the promise is made. Where A having a bare against B. delivers it up to be cancelled on B's promising to pay the contents.

It is a general rule that a contract is not supported by a consideration altogether past and executed. Thus if in consideration that one has bailed my servant out of prison or discharged me of a tresp. or built me a house gratis I promise to pay be the promise is not binding; for here there was no subsequent consideration no benefit or advantage arising from the promise to either party.

But tho' part of the promise or consideration be past, yet if a part be subsequent, the contract may be good. Thus if a lessor in consideration that the lessee, had accepted and paid the rent, promised to save the ~~other~~ harmless cattle harmless, the promise is good tho' the acceptation be is past yet the lessee was to continue in possession and pay the rent.

So a ~~consideration~~ contract on a consideration executed is good if there was a previous legal duty on the promisor; as where one in consideration of a previous indebtedness promised to pay in consideration of the Pltfs. having buried his child

Remarks

1 Bl. 1 Pow. 351.
1 Fon. 336.
F. Ry. 1 Eq. Cas.
290. Esp. 95.
B. N. P. 147

1 Pow. 351. 2.
1 Vent. 268.
3 Salk. 96.
1 Bulst. 120.
Dyer. 272.
Cro. 2. 409.
Cro. J. 18. Cro.
El. 42. 282.
Esp. 95. 1 Fon.
336

The use of a stranger - maintaining an action against the real proprietor

1 Pow. 343.
353. 1 Vent. 6.
318. 332. 8
Mod. 117. Cas.
443. 3 Lev.
24. 3 Keb. 635.
3 Bac. 186.
260. 261.
4 Vin. 15.
Burr. 2680.
Esp. 576
B. N. P. 35.

Pow. 350 or
340
1 Vent. 318.
332

1 Pow. 353.
354. Cro. El.
206. Esp. 95.

Contracts.

So if there was a prior moral obligation on the promisor, this is a sufficient consideration as where a promise is made to pay an honest debt barred by the stat. of limitations. so in case of a promise to pay, by the father, for the past nursing of his natural child –

So a consideration completely past will support a contract: if the consideration be at the request of the promisor, for the contract ~~consideration~~ tho' subsequent complies itself with the previous request. As where D. promise to pay in consideration that James Gould ~~at~~ had at my request bailed my servant.

A mere stranger to a meritorious act done to another cannot support a contract upon it in his own favor: for he does nothing favorable to the promisor or disadvantageous to himself: he being a stranger to the consideration. As where A in consideration that B. will acquit him of a trespass promises B. to pay C. £ 100.

But a consideration moving from one will support a contract in favor of a near relation. As where a promise was made to A. (in consideration that he would perform a) to pay his daughter.

When forbearance of a suit is the consideration there are two requisites. 1st. The forbearance must be either general that is total or for a certain period and 2d. It must be of an

Remarks

1 Pow. 358. 4.
Eso. Ab. Pl. 19.
455. Esp. 95.
Nut. 108 —

Pow. 354. F. 5.
Hard. 73.
3 Salk. 96 —

1 Pow. 355.
Esp. 94. Hard.
73.

Pow. 356.
Hard. 75.

1 Pow. 356.
Stra. 142.
Dyerey 2 —

Contracts.

action in which the promisor or person to be ~~bailed~~ liable, is chargable.

1st. A promise to pay a debt therefore in consideration that the Pltf. would abstain from suing no time being limited: and forbearance not being expressed to be total is not good, and the Court are to Judge what is a reasonable time

2d. A promise by a mother to pay a debt due from her son who was dead, if the Pltf. would forbear to sue her was held not to be obligatory: for there was no consideration to support it, the mother was not liable and of course forbearance was no favour to her and no disadvantage to the Pltf.

So if one be arrested on void process and an other in consideration of his release, promise to pay the latter is not bound for here is no consideration.

So a promise by A. to pay B.'s debts if the creditor will forbear to sue B. for 6 months is not good at Com. Law, for he might sue B. immediately and therefore the forbearance was no prejudice to the creditor.

But a promise in consideration of forbearing suit is good, if there be a reasonable ground for the suit.

Thus where an infant bought silk and velvet and died. His Extr. in consideration of forbearance promised to pay, the promise was good at Com. Law; here was colour for a suit his being Extr.

Remarks

(a)

In case where A. agrees to give B 6 shillings on the first of August 1804 for work which is to be done on the first of Sept. of the same year — here B. can sue for his 6 shillings before the time comes to do the act —

1 Pow. 357. Hob. 18.

1 Pow. 357. 1 Vent. 177. 214. 3 Salk. 95. 1 Pow. 380. 12 Vi. Bl. 274. 3. 277. 7 Co. 10. 7 T. R. 130.

respecting the amount of this consideration
or where persons for persons of a consideration it is enough to aver the promise without performance where the act being as to be done first that must be averred. It have been done yet altho by the terms of a contract that anything ought to be done first yet if it appears that money is to be paid before the time of doing anything then this money may be paid for before doing &c —

4 T. R. 761. 7 T. R. 761. 125. 5 Com. 50. 3 Salk 112. 112. 171. Doug 639. 666. 688. 17 Vi. Bl. 368. 3 Chg. 66. —

If conversed must aver — In mutual promises in a Lunatic Court never decrees without having done or offering to do

1 Pow. 338. 358. 1 Pow. 381. Salk. 171. 7 Co. 100. 1 Vent. 147. 8 Mod. 42. 5 Vin. 70. Ld. Ry. 662. 1 Saun 319. 7 T. Ry 130.

Dyer 76. 1 Roll 114. 115. Pow. 358. Salk. 171. 3 — 1 — 95 —

Contracts.

When a promise is in consideration of forbearance to the original cause of action is not to be enquired into it is acknowledged by the promise.

When that which is stipulated on one side is in consideration of the forbearance on the other, the considerations are termed mutual: As where I agree to pay P.S. for doing a certain act; Here the doing he is a consideration precedent to his right to the payment: If he sue for the price, he must aver performance.

So where performance on both sides is to be concurrent, neither party can compell the other to perform, tho' he has performed his part or offered to perform: As where A promises to deliver B. a load of wheat on such a day for such a price.

If the agreement be that one shall do an act for doing which the other pays; the doing is a condition precedent: but if according to the terms the money is to be paid on a day, which is to arrive before the act can be done: the doing is not a condition precedent and an action lies for the money before the act is performed; here indeed the payment ~~of~~ is a condition precedent. (a)

But if the day appointed for payment, be to arrive after the time fixed to goth do the act, the performance of the act

Remarks-

1 Pow. 359. 360.
1 Vent. 117.
2. 14. Hob. 88.
1 Lev. 293.
3 Bulr 189.
Hard 102.
Salk. 24. 5
Mod 411.

1 Ton. 383.
1 Bro. P.C. 184.
Forb. 12. 445.

2 Term 35.

Salk 112.
Hob. 663. Bl.
R. 1312. 12
Mod. 403.
1 Ton. 382.
1 W. Bl. 270.
4 T. R. 761.
Willes R. 496.

Doug. 665.
1 T. R. 645.
6-11-570.
7-11-130-

Doug. 655.
x Bl. R. 1312.
1 Ton. 382.
1 Lev 16.
3-11-41.
Cowp. 56.
4 T. R. 761-

Contracts.

is a condition of precedent and must be averred in an action for the money.

But where the promises are mutual, i.e. where the promise on each side, is the consideration of that on the other: an performance is not a condition precedent on either side, to a right of recovery, either may sue without averring performance on his part.

The rule does not obtain in equity for here the Plfff. must aver performance or readiness to perform tho' the covenants are mutual otherwise equity will not interfere.

If the agreement be in this form, "I promise to pay £100 in 6 months you transfering stock" and e converso, the promises are not mutual and neither can compel performance till he has performed.

The question whether promises are mutual & dependent is to be determined by the meaning of the parties, to be collected by the spirit of the agreement, and the nature of the contract, that is from the order prescribed in which the intention requires their performance.

When the promises are mutual, it is no bar to an action that the Plfff. has not performed his part, each may have a cause of action against the other at the same time.

Remarks

4 T. R. 761.

mutual promises, both binding on neither

1 Pow. 369. Salk. 24. Hob. 88.

delivery to A of money which he undertakes to deliver to B the undertaking a consideration

preservation of peace of a family -

compromise of a doubtful right

Ld. Ry. 909. 910. 919. 920. Cro. J. 667. 5 T. R. 143. 1 Pow. 364. Com. 133. Salk. 26. Pow. 362. 1 Atk. 3.

where the one promise is a consideration for the other performance and necessary when anything is to be done ~~on one side~~ ~~the performance of it~~ that must be done and to be done. The declaration concerning promises ~~&~~ amended must be made so

Pow. 362. 1 Atk. 3.

1 Pow. 362. 8. 1 Atk. 10. 2-11 - 152. 1 Wm. 4. 2 Ver. 284 or 234. 2 Vent. 352. 352 -

1 Pow. 368. 1 Ver. 450

Co. 40. 1 Pow. 368. -

Contracts.

The Eng. courts have leaned of late against construing promises so as to render them independent as such a construction has a tendency to multiply ~~suits~~ suits.

Mutual promises must both be binding or neither will and both must be made at the same time, otherwise they are mere nuda pacta.

The mere act of intrusting property to an other on his undertaking to do something respecting it, is a sufficient consideration. As in case of a delivery of money to be delivered over to an other.

The preservation of the honour and peace of a family, has been holden a sufficient consideration in Chan. As an agreement between the putative father, son, and natural child, to prevent family disputes &c.

So compromises of a doubtful right, was holden to be a sufficient consideration in Chan, as the settling the bounds of lands.

It is not necessary in contracts, that the considera=tion be expressed in direct terms; it is sufficient if one can be collected from the whole agreement taken together.

But if an express consideration appear upon the face of the contract, the better opinion is, that no other can be implied; for it is a maxim that nothing can be implied where a word

Remarks.

2 Co. 8. 9. 11 –
– 24. 2 Bac.
5 94. 2 Bl.

1 Pow. 145.
Ke 2 P.W. 202
3 – 11 – 290 –

3 T. R. 484.

WR

it is expressed.

At Com. Law fraud in the consideration of the contract, does not in general vitiate the contract, tho' fraud in the execution does. The reason of this distinction is, that assent is wanted in the second case but not in the first.

But Chancery will relieve against contracts for fraud in the consideration. At law the party must resort to his special action for the fraud committed against him.

In one case however the Court of B. R. seems to have considered fraud in the consideration of a contract a good defence. But the circumstances of the case were peculiar, perhaps other points in it influenced the decision.

Of Consideration in Contracts again considered.

To every executory contract a consideration is necessary to give it validity; therefore it is that a promise to do an act for an other, or to build him a house or to give him a sum of money, is not binding and can never be enforced either at law or equity; but if the contract has been executed, that is to say, if the gift has been made and the possession of the ~~party~~ property parted with by the

Remarks

donor. Property so given is liable to the creditors of the donor, for every man must be just before he is bountiful; but this does not effect the right of the donee against the donor. This doctrine is I believe universally admitted to be sound, so far as it respects personal property; but it is said if a man conveys land to an other without any consideration in such conveyance shall accrue to the use of the grantor –

There does not seem to be any reason why a man should have greater benefit from real property when he parts with it voluntarily than from personal. The reason why we find such a position in our books I apprehend to be this – During the civil wars in Eng. between the houses of Lancaster and Yorks, the real property of the leading characters in the nation was greatly exposed to confiscation for rebellion as the contending parties alternately prevailed, they would therefore convey their real property to object persons (who would not probably take an active part in the commotions which then agitated the country, and if they did would not be noticed) to their own use or that of some friend whom they wished to provide for in case of death for it was an established principle that an use was not subject to forfeiture, and the grantee to uses had only the legal title and the grantor was entitled to the beneficial interest,

Remarks.

for should the grantee attempt to prevent the grantor from enjoy=ing the estate so granted a court of chancery would compell the grantee to suffer the grantor to improve the estate as his own During this period it happened that if a man granted his estate to an other for no consideration the presumption was that it was granted to his own use, but in that case there can be no doubt, but that the deed ~~happened~~ passed the legal title to the grantee, and the use by the courts of chan=cery, adapting the idea of the presumption alluded to vested in the grantor — If this be a just mode of considering the subject it is apparent that this doctrine grew out of the state of society in Eng. and cannot be applicable to any other country under different circumstances — But it became an estabtished rule and of course when the stat. of uses was enacted giving to the <u>Cestui que use</u> the legal title, such conveyances, had not any the least ope=ration: for if it might be said that it transferred the legal title to the grantee, the stat. immediately transferred it back ~~again~~ to the grantor — It seems to me that in this country no presumption can arise of any intention in the grantor, that he should be entitled to the use and upon general principles I entertain no doubt, but that a grant of land without any consideration good or valu=

Remarks

=able attended with the delivery of the deed, as much vests the land in the grantee, as a gift of a horse attended with a delivery vests the property of the horse in the donee. I consider it therefore as a sound principle that in contracts executed no consideration is necessary to vest a title to property granted, and it is as universally true that a consideration is necessary to give validity to an executory contract.

Altho' a consideration is necessary to an executory contract, yet if the contract is in writing and acknowledges ~~that it was made up~~ a valuable consideration, no parol proof is admissible to shew that it was not, but this does not proceed upon the ground that a consideration is not necessary where the contract is in writing but parol cannot be admitted to contradict what is alledged in a written agreement; for if the consideration which is acknowledged ~~to be~~ to be valuable in a ~~writting~~ writing should be detailed at length in the instrument itself or any other collateral instrument counting upon such contract and when detailed it should appear to be no consideration in the eye of the law I apprehend such contract would have no more validity than a parol contract without consideration: for in this case the want of a consideration is not shewn by parol testimony but by

Remarks.

Contracts.

written documents of as high a nature and validity as the contract itself.

If the written contract should not acknowledge any consideration, then indeed it may be averred in the declaration that there was one and this averment may be supported by parol proof; for altho you cannot introduce parol proof to contradict a written instrument agreement, yet you may introduce it when it stands well with the agreement and never to give it effect.

Here we must notice a difference between a mere written agreement and one that is sealed. It now becomes a specialty, and altho' their is no consideration expressed in the agreement there is no necessity to aver any to give it validity, for from the act of sealing it is presumed that there was a consideration, and of course if their is a covenant to do any collateral act the Pltf. must recover on the contract, where there has been a failure of performance, whether any consideration is acknowledged or not. but as it is not consistent with the rules of law that the quantum of the consideration should be enquired into, and there appear to be no other than what is implied from the act of sealing in such case only nominal damages will be recovered, and a Court of equity will never decree a

Remarks

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a specific performance of such a contract.

If the contract is to pay a sum of money as in a bond or covenant, here the action must be an action ~~must be assumpsit~~ ~~ion~~ of debt, and in this action the whole sum must be recovered if any thing, and is not governed by the rules that operate where the action sounds in damages, where the triers are at liberty to give less or more damages according to the equity of the case.

In such cases it is plain there can be no use in the enquiry as to the quantum of consideration, for if there is any consideration the whole sum must be recovered and it is certain from the seal that there is a consideration.

Notwithstanding these observations I should suppose that the contract being sealed would not in every case give validity to a specialty; suppose for instance that the covenant detailed at length the consideration or the bond in the condition discovered the consideration and it was one which the law considers as none; here altho' the law presumes a consideration from the act of sealing yet in such case this presumption is completely rebutted by the instrument itself shewing what that consideration is. N. B. In Con. we consider notes of hand as specialties.

Remarks.

1 Bac. 247.
1 Pow. 333.
2 " 268. 64.
Hob. 41.
1 H. Bl. 363.
2 — " — 316.
3 Burr's Rep.
2. L. 373.
1 Atk. 245.
7 T. R. 64.
2 Bl. ——

1 H. Bl. 363.

1 Pow. 358.
1 Fon. 380.
5 T. R. 409.
6 — " — 571.
66 H. 1 Vent
177. 214.
9 Co. 10.
Cro. E. 2L. 889.

4 Bac. 16.
2 H. Bl. 570.

1 Vent. 174.
214. Salk.
112. Stra.
458. Cro. E.
488. 12 Mod.
503. 1 H. Bl.
270. 3.

Contracts.

The manner of closing a Contract.

When the terms of a contract are mutually accepted; as if A. says "I will take £20 for my horse" either party may close by tendering on his part.

But if in this case no tender be made, no delivery be given, no earnest accepted and the parties seperate, both are at liberty to refuse performance; but if a day of payment be fixed within a year the party is charged and neither is afterwards at liberty to retract.

Query. Is the vendor in the last case obliged to deliver the horse on the day fixed without receiving payment?

A promise made in consideration of an act to be done is not binding till the act is done or perhaps till the promisee has offered to do the act, and has been prevented by the promisor. And in a suit on the promise, performance or atleast an offer of performance must be averred.

But whereas one promise is in consideration of an other, performance need not be averred by either party. In case of conditional promises; as if A. agree to make a deed to B. on the 10 of May B. paying £100 to A. on the same day and making such a deed the contract is incoate only.

Remarks.

1 Fon. 281.
Doug. 688.
684. 4 T. R.
761. 766.
5 11 — 555.
571. 7 — 11 —
125 — —

1 Bac. 16.
Co. Lit. 172.a
1 Com. 85.
2 Roll. 161.

1 Bac 17.
1 Com. 88. q.
Co. Lit. 89a

Contracts.

But either party may on the day fixed tho' not afterwards close it by performing on his part. If neither party performs his part at the day the contract is at an end. And if on promises of this kind suits are brought, by either party performance must be averred.

Actions founded on Contract.

I. Account.

This is an action founded upon an express or implied contract that one who has received property of an other to account for, will render his account for it. If he does not render it, this action lies.

It lies at Com. Law only against guardians in socage bailiffs and receivers and joint tenants they being receivers for each other.

By the stat. 4 Ann this action is extended in favour of one joint tenant and tenant in Common against the other as bailiff.

At Com. Law the action lay only between the original parties themselves, and not for or against their Ex^tors & being founded on such privity of ~~conduct~~ contract, or that one party

Remarks.

1 Bac. 17.
1 Cow. 88.
2 Burr. 404.

1 Bac. 17.
Co. Lit. 89a.
1 Bac. 17.
3 Bl.

Co. Lit. 172.

Co. Lit. 172a.

Co. Lit. 172a.

Co. Lit. 172a.
1 Bac. 19.

was supposed convenient of the other's disbursements &c. But to this rule there is an exception in favor of Joint merchants not against them.

By the stat. West. 2. that is 13 Ed. 1. 25 Ed. 3. and 31 Ed. 3. this action was extended generally to Ex^tors the Ex^tors of Ex^tors and to Ad^tors. Stat: 4 Ann extended it against Ex^tors and Ad^tors of Guardians and wards bailiffs and reciever and to, and against, the Ex^tors and Ad^tors of Joint tenants and tenants in common.

The distinction between bailiffs and reciever is this. A Bailiff is one who has received the property of any kind of an other to improve for the owner and account & who is intitled to an allowance, or wages ~~or wages~~ for his reasonable expences or charges.

A bailiff must account for profits which he has made and for those which he might have made by reasonable industry.

A reciever is one who has received money to the use of an other to render an account and who has no allowance for his trouble.

Generally a reciever has no allowance and is not bound to account for the profits but to this there is one exception as between Joint Merchants, for here the defendant has allowance and account for the profits

Co. Lit. 172.a
1 Bac 19. —

1 Vern. 406. 2 —
— 342. 2 — " —
2 g & — 1 Atk. 489.
1 Com. Ch. Ca.
229 —

1 Bac 19. 2 Brown
Ch. 76 —

Rob. 206.

1 Com. Dig.

Co. Lit. 172.a
1 Bac. 21. 2 Mod.
101. 1 Com. Dig.

Co. Lit. 172.a

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A Bailiff can not be charged as receiver because if he were he would loose his allowance.

This action being founded on privity of contract, lies not in cases of tort, except in favor of the king and infants.

In declaring against a Bailiff or Receiver; the Pltf. states that he delivered such property to the Deft. as Bailiff &c. and that the deft. refused to render his reasonable account to the damage &c: and demands of the Deft. his reasonable account together with his damages aforesaid and his costs &c.

In case of partnership and the purpose of joint trade &c the Pltf. states that the Deft has received more than his part &c.

It is said that an action of account lies not where the sum is certain. As if one delivers £100 to A. to trade with the former shall not have account for the £100 but for the proffits. Quere. Does not this action against lie against the sheriff who has received a certain sum.

Should not this rule be, for a sum certain one cannot be charged as Bailiff.

Where one receives money to the use of another to render an account, an action it seems will lie, for an account of the money received.

If money has been received of A. by C. to deliver to B. ac-

1 Com. 88.
1 Roll. 120.

1 Com. 78. 87.

1 Com. 89.
1 Roll. 118.

1 Roll. 118.
1 Com. 89.
1 Bac. 19. 1 Roll.
116.

1 Com. 89.
1 Com. 24.

1 Com. 87. 89.
1 Roll. 118.
128.

1 Bac. 17.
1 Com. 89.
Co. Lit. 172.

1 Bac. 21. Murdo
42. 1 Com. 92.
5. 1 Wilm. 99.

Contracts.

count lies by B.; B here the Pltff. must declare of whom the money was received –

So if money be delivered to be redelivered on a certain event –

~~It ill~~ Still if D. deliver money to A. to deliver to B. for my use, and A delivers it, D cannot have account against B. for he is not privy to the use –

If the bailee of goods waste or refuses to deliver them account will not lie; but Trover or detinue will; for he does not receive them to improve of or account for –

So it does not lie against a director for the profits for the action is founded on Contract – Except in the case of an infant he may consider a director and treat him as a guardian –

If A's. Bailiff be make a deputy A cannot have this action against the deputy for want of privity, but the bailiff he may –

Tho' an Infant may be an Ex^tor and liable for torts, yet if made Bailiff he is not liable to account for he cannot contract and is supposed incapable of accounting –

In an action of account if the Pltff. prevails there are two Judgments first that the Deft. do account after which auditors are appointed before whom the accounting

1 Com. 98.

1 Com. 95. Cro. 2l.
Bro. 3 Wilm. 16.

The last author
cited to the contrary.

1 Bac. 16.

1 Bac. 20. Salk.
9. Carth. 89.
Esp. 97.

Salk. 9. Carth.
89. Esp. 97.
Queen: 1 Burr. 22.

1 Bac. 20.

1 Bac. 19.
1 Roll. 118.
Cro. 2l. 644.

Contracts.

is had.

The auditors then make their report and final Judgment is rendered upon it as on a verdict.

Before auditors the parties are of common right entitled to testify.

If the Deft. refuse to go before auditors, to produce his accounts, the Auditors must award to the Pltff. the whole of his demand.

If auditors find a balance in favor of the Deft. they may award it; and Judgment goes for him to recover damages.

This is the case in Chancery only.

If he who receives property of an other to account, makes an express promise to account, this action or a special Aft. will lie.

But in this case it is said by Bott, the Pltff. shall not travel into the particulars of the account but confine himself to the damages which he has sustained by the Deft's not accounting.

Does not the law imply a promise, and is not this a good ground of Aft.

If one by deed acknowledges that he has received property to account. The Pltff. has his election to bring an action of account, or on the deed.

3 Wils. 113.

1 Bac. 20.
1 Com. gl. 219.

1 Wils. 123.
1 Bac. 20. 4-n
— 8. 9.
Eq. Ch. 82.
4 Bac. 85.

1 Com. gl. 4.
Eq. Ch. 830.
3 Wils. 115.

1 Bac 20.

4 Bac. 85.
6 Co. 7.

1 Wils. 113. 1 Com.
91.

Com. gl. 92.

Contracts.

If one find property of an other account lies not against him for the action is founded on privity of contract, trust, confidence &c.

As to what the Deft may plead in bar there is much contradiction —

It is competent for the Deft — to plead any thing to the action which shows that he is not bound to account. It is a good plea therefore that "he never was Bailiff" &c this is the general issue.

So a release of all actions is a good plea in bar —

So an award of arbitrators that the Deft. should be acquitted, is a good plea in bar —

Plea that the Deft. paid ~~the money~~ received the money to deliver to P. I. and that he has delivered it is a good plea.

But plea that the deft. has made payment of the money is not good for he was bound to account —

So a plea that ~~that~~ the Deft. has made and given him a receipt for the money received is not good for a receipt is but evidence of payment which admits formal liability and does not affect the Pltfs. right ~~to account~~ of account —

So "that the deft has fully accounted" is a good plea in bar — On this plea, the Deft. cannot go into the account but must prove the fact.

It is a general rule that if the Deft. shews that he

3. Wils. 118. — 114.

1 Com. 93. 1 Bac. 21. 3 Wils 99. 117. Eq. Ca. 34. or 84. 406.

Vater 411. 1 Bac. 21. 1 Com. 98. 3 Wils. 73. 101. 118. Com. 219. 3 Wils. 114. —

Eq. Ca. 82. 3 Wils. 118.

1 Roll. 124. 1 Bac. 121. 1 Com. 93. Co. Lit. 89. a.

1 Bac. 21. —

Contracts.

has once been liable to account no plea in bar of the action is good except "fully accounted" and a release or something equivalent to it; as an award of a release, or in discharge &c other things must be pleaded before auditors.

"Fully accounted" "release" &c must be plead specially.

Before the auditors, parties may plead and join issue in law or fact, the issue is then to be carried back into court and there tried.

Whatever can be pleaded in bar to this action, must be so pleaded, and not before auditors because it will avoid trouble and charge to the parties.

And nothing can be pleaded before auditors contrary to what has been pleaded in court and found.

Therefore "never bailiff" &c "release" "fully accounted" "an award in discharge" are not good before auditors.

It is a good discharge for the Deft. or as it is sometimes called, good accounting to shew anything which could not be pleaded in bar to the action but which discovers that he ought not to be eventually liable.

That the property in his hands was lost at sea in a tempest: or that they were cast over board is good before auditors.

So if the goods were taken by robbery without his

Stra. 640.
Com. 91.—

1 Bac. 21.
2 Mod. 100.

Com. 94.
Co. Lit. 19.a

1 Bac. 10.

3 Bl. Com. 484.
449—

Esp. 172. 313.

Doug. 6. 1 K. Bl.
550—

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fault; or taken by an enemy.

Quere Was not the plea that the goods were taken by enemies in Strange, a plea in bar to the action?

That the property was perishable &c in danger of perishing and that he sold it on credit, without a special commission to this effect is no good plea.

The Deft. accounting is allowed all losses occasioned by inevitable accidents by open enemies or robbery without his fault.

When the report is returned to the court, final judgment is rendered for the sum awarded.

In Eng. the action of account is not much in use. The common remedy is in Chancery for in courts of law the Pltf. is not entitled to a discovery of books papers &c; nor to the Deft's oath.

III. Debt.

The legal acceptation of the word "Debt" is a sum of money due, by a certain express contract, as by a bond for a determined sum, note, special bargain &c.

So for a sum capable of being ascertained.

Any action of debt lies in some cases on contracts im-

* Debt will lie in such case and a recovery for a less sum than the demand the recovery will be for the sum as ascertained by the martial power but the Pltf in his demand may leave mistaken that power — 4 Co. 94. 3 Bl. 1 W. Bl. 650

3 Bl. 156.

3 Bl. 343.

— the reason why in case a mort mortuel damage may be recovered on a covenant and the full sum of a bond is not the recovered — 3 Bl. Dyer 219. 2 Roll. 406.

Bl. Rep. 1321.

0 The real reason why Debt does not lie against an executor — Esp. 1 Ld. 9 Co. 87. Cro. El. 155. 187 — — —

Esp. 178.

A the reason why Debt does not lie on a promise to pay for the debt of another — Yelv. 1886. Cro. E. 107. 140. 198.

Contracts.

plied, but not I presume to on parol contracts implied — As if A sold goods and agreed by parol for a fixed price, "Debt" lies, but if no price is fixed debt will not lie —

Debt on simple contract was disused in Eng. by reason of the wager of law, which is the Deft's swearing that he owe's nothing and compurgators swearing that they believe him —

Wager of law is equivalent to a verdict for the Deft. ~~equivalent~~ —

— 2d. ~~Deft.~~ The whole sum demanded must be recovered if any according to the old rule —

This rule is not ~~to~~ now observed Doug. 6. 7. 8. note — 1 H. Bl. 249. - 550 —

In some cases "Debt" lies not on express simple as against an Ex.tor or Ad.tor for a testator might have waged his law but an Ex.tor or Ad.tor cannot.

If one expressly promises to pay a sum certain for property to his own use or for services rendered to ~~him to self~~ himself debt lies — Otherwise in some cases, if he promises for another: ~~As if A promises~~ As if a promise made to A to pay the debt of an other due to him in consequence of A's relinquishing in favor of the promisor a lien on the debtor's property, "Debt" in this case will not lie the proper remedy is assumpsit. — — —

Esp. 172. 4 Co. 47
Cro. Eliz. 155. 157.

Esp. 173. Salk.
23.

2 Bac. 14.
1 Roll. 598.

Lutth. 360.
1 T. R. 462.

Id. Ry. 1600

2 Bac. 14. 1 Roll.
600. 1. 2 Bl.

Stra. 923.

Burr. 2482.
1 T. R. 557. 6 = 11 —
525. 7 — 11 — 420.
8 — 11 — 120. 3 Wils.
13. —

+ & the real ground why in that case debt does not lie

2 Bac. 360.

Contracts.

If a person promise promise to pay for goods when the person for whose use they were delivered is not liable. It seems that debt will lie — Emere. 22 Ky. 842 or 342.

So debt does not lie against the holder of a Bill of Exchange: he is rather in the nature of a surety or guarantee: The drawer is the debtor and liable in debt.

Debt lies in some cases on implied contracts and sometimes where there is nothing like a bargain or contract or other commercial transaction, from which to implie a contract, as on a penal stat. when the penalty is certain there being no specific mode of receiving the penalty prescribed.

This is the common practice in Eng.

To debt on a penal stat. not guilty is a good plea.

Not guilty is not a good plea to debt on specialty.

The debt lies not to recover damages yet after damages are recovered lies on the Judgment, for the demand by the judgment is made certain.

So upon an award of arbitrators to pay a sum certain.

When the Deft. in a judgment is in custody on the execution debt on judgment does not lie no. being in custody he is discharged with the Pltf. consent: for taking in execution is satisfaction in law.

Generally execution cannot issue in Eng after a year

Carth. 30.
1 Bid. 351.

2 Bac. 862.
Cro. J. 364.
1 Roll. 599.
6 Mod. 288.
Carth. 289. or
289.

1 Roll. 601.

1 T. R. 637.
2 Bac. 14. Carth.
30. 3 Bl.

2 Bac. 211.
4 T. R. 458.
3 Wils. 345.
8 Co. 142.

The reason why an action does lie on the erroneous judgment

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and a day, and in this case the Pltfs only remedy was by debt on Judgment by original writ, after such a term, payment was presumed.

The stat. of West. 2. gave a sci facias in this case to shew cause why execution should not issue: and now after a year and a day the Pltf. cannot issue execution without a sci facias except where execution has been stayed by a writ of error or some other cause.

It has been said that in Eng debt on Judgment will not lie within a year and a day.

Quere. It is said in Bacon, that debt on Judgment will lie, to punish the deft. for not paying the money recovered by the judgment, without putting the Pltf. to the trouble and expence of suing the Execution and thus compelling payment.

It seems therefore that the action will lie before a year and a day.

An erroneous Judgment will support this action, for such Judgment is ~~valuable to all in~~ valid to all intents and purposes till reversed.

By the constitution of the U. S. full confidence is to be given in each state, to a judgment rendered in an other.

If therefore an action is brought in one state on a judgment rendered in an other, no enquiry can be had into the original cause of action.

1 Doug. 1. 2 H. Bl. 410. 4 — 11 — 16 B.

Stra. 1090.

Doug. 1.

2 H. Bl. 410.
2 Show. 282.
T. Ray. 473.
Skin. 59. Doug. 1 — 6.

Doug. 6.

2 Bos. 13.

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A judgment rendered in a foreign country, is both in Eng. and the U.S. prima facie evidence of a debt, but in an action on such judgment, inquiry may be had into the original merits.

Formerly it was holden that debt would not lie on a foreign judgment.

The Pltf. in declairing need not shew the original consideration –

To debt on such judgment "nul tiel record" is a void plea; yet declairing on the record does not vitiate the declaration.

In deb. Pltf. is concurrent with debt on foreign judgment. Doug. 45. 6.

It is said where Ind. Pltf. – debt also will lie this is not always the case or where money is paid by mistake, obtained by fraud, by breach of trust by sale of property converted by a stranger. The rule is to be understood I conceive in general of express contracts, and those implied from transactions in the nature of contracts, as for example sale of goods without express promise &c A foreign judgment is not altogether like one of those cases but seems to be so considered –

If judgment has been obtained by fraud it is a mere nullity. Cro. J. 514 2 Wilf. 47. 3 – 11 – 841. Bl. R. 845. Stra. 509. 992.

For money received by bond or single bill debt is the only remedy –

7 J. R. 124.

Stra. 1089.
1 Roll. 591.

2 Rous. 136. 8c.

2 Bac. 14. Hob.
206. Moor.
364 or 884.

2 H. Bl. 540.

2 Bac. 14. Cro.
J. 514.

Hob. 206.

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If a bond is given conditionally for the performance of a collateral act, there is sometimes there is a remedy in Chancery, it being viewed as an agreement to do the act. But the only common law remedy is the action of debt for the penalty.

A bond be payable be generally that is, no time of payment being fixed, is payable on the day of the date.

On a contract to pay a sum certain debt lies.

If there is a covenant with a penalty the obligee has his election to sue for the damages in "covenant broken" or in "debt" for the penalty unless it appears that the obligor was to have his election to go do the act or pay the penalty. In such a case on non performance of the act, the action lies for the penalty only.

Debt lies against an officer who has collected money on an execution, on a refusal or neglect to pay it over. For levying it implies a contract in Law.

This seems an exception to the general rule that lies not on parol contracts implied. But by levy the Judgment debt is considered as transferred to the sheriff.

But debt will not lie for collateral articles levied and not sold for want of purchasers.

But if he should collect collateral articles taken and estimate in his return, at a sum sufficient to pay the debt &c

Salk. 248. 3 Bac.
518. Sel. Pay.
566. Esp. L. 62.

152
3 Mt. Cno. J.
361.

3 Burrows 1686.
2 L. 67. 4 Pepe.
11 —

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and should neglect to sell them it would seem that debt lies against ~~them~~ him. For his own return shews, that the Deft. in execution ought to be exonerated.

In debt on parol contracts the stat. of limitations, or a release may be given in evidence under the general issue.

III. Detinue.

The action of "Detinue" lies for the recovery of a "specific chattel" in nature of a Bill in Chancery. The Judgment is for a restitution of "things detained" conditionally, Viz. that if it cannot be had, the Deft. shall pay the value and damages of detention.

It lies to recover anything which can be identified & not for money, Corn &c unless in a bag &c.

It lies for a piece of ~~gould~~ gold of such a value or 20s. but it does not lie for 20s. in money.

It lies in those cases only in which the Deft. obtained possession lawfully, as by delivery or finding.

The action of detinue seems founded on contract and may be joined with debt in one declaration.

Trover lies in all cases where detinue ~~seems founded~~ lies, but this rule does not hold a converso: for trover lies where the taking is tortious.

Law. gramm
351. 1 Bac. 163.
Bul. N. P. 158.

1 when is an express assumpsit a proper remedy
2 when is it consensual well indebitatus assumpsit and when not
3 When is it consensual having the same object in view
4 when is it the only remedy
5 When is indebitatus assumpsit to be brought
6th when may an indebitatus be brought as well as express and the rule of damages not the same
7 when is it consensual with debt & when not
6th when the only remedy

B. N. P. 128 on
12 B. 1 Bac. 163.

2 Bl. Rep. 559.
6 Mod. 126.

Contracts.

The reason why detinue does not lie where the taking is tortious seems to be, that originally that a tortious taking was considered as divesting the owner of his property. And in Detinue the Plt. must have the property of the thing demanded. This action was disused by means of the wager of Law, Trover has taken place of it, under the equity of the stat. of West. II.

Assumpsit.

Asst. is an action founded on simple contract whereby damages are recovered for a breach of any promise contract or undertaking.

The action of Asst. is derived from the stat. of West. II.

Of Asst. there are two kinds 1st Express. and 2d Implied as they are frequently called 1st Special Asst. 2d A general Indeb. Asst. The former of these lies on express agreements, promises and engagements, which may be either written or parol.

The ground of recovery in this action is the agreement which is all the measure of apecuniary damages.

The latter is founded on a duty upon moral obligation which creates a promise by implication of law.

But it also lies in cases where it is impossible to presume a promise, or where a husband has forbidden any one

If the law requires a contract to be in writing it need not be stated but must be proved
if law does not require it yet it is no cause of
judgment must be set aside
All values conserved with any other of Europe
values conserved with an allusion of an esq
for France — the generals are stage very

~~[illegible]~~

10th an expense affair yet has it [illegible]
a need to inform fulfilment. [illegible]
debt for generally

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to supply his wife whom he has turned out of doors, with any thing on his account. Where one robs an other of his money, in these cases Ind. Asst. lies –

It may then be laid down as a rule that whenever one is bound in Justice and good conscience to pay money to an other the Action of Ind. Asst. lies to obtain it back again unless where justice or nation policy forbids a recovery; as in cases of debt on which the statute of limitations has run or in gambling debts &c –

The damages in this action are not ascertained by the agreement, for usually there is no agreement, but they were such as in equity and good conscience ought to be recovered.

When a contract is detailed at length whether it be by speech; written without seal or written and sealed, the action for breach may be brought on the promise: And if in contracts of this kind a debt is created by the agreement, a special Asst. Ind. Asst. on the action of Debt are concurrent actions and the Pltf. may have either at his election –

Upon a breach of contract neither debt nor Ind. Asst. lies, a special Asst. lies for a recovery of damages: the damages being uncertain. But if the damages for non performance are ascertained by the parties to the contract Ind. Asst. also lies. In the latter case, the Pltf. the promisee may at his election bring

11th. but if the penalty is such as leaves the persons at large, election should must be void; generally void

5 T. Ro. 604.
3 Bro. Ch. 29.

Cates 197—

8 Bac. 169.
Burr. 1012—
Comp. 116—796.
797. 1 Finch.
Rep. 174. 185.

1 Finch. 20. Dep.
95. Dick. P. 147.
178. Ch. 90.
3 Ch. ——

1 Bac. 169. Dep.
1. 4 Co. 92.
Burr. 1008.
4 T. Ro. 285 ——

Contracts.

Ind. Asst. for the penalty agreed upon; or a special Apt. for damages to be assessed by a jury if it appears that the penalty was in the nature of a security for performance, to make the promise stronger.

But if it appear that the promisor was to have it in his election to perform the promise or to pay the penalty ~~[illegible]~~ [illegible]

A breach of trust by which one has been deprived of a sum of money is a ground of Apt.

Ind.t lies in some cases where a special assumpsit does not: As for the price of goods sold on a quantum valebat when no express agreement was made: Also for services done on a quantum meruit no price having been fixed by the parties. And it is not necessary for the Plft. to declare the precise sum due.

So for money loaned or for money paid to the Defendant at his request express or implied; or expended for that which it was his duty to do, Ind. Apt. lies.

Tho not if the money was paid or expended against the will of the Deft. In these cases debt also lies. Quare.

Not withstanding the general position that Ind. Asst. lies in those cases only, in which debt lies: there are some cases where Ind. Apt. is the only action excluding both debt and special Apt.: as for money paid by fraud, for money paid by mistake, and here it lies in disaffirmance of the con-

2 Ch. Ro. 64 Ib. 385.
n. 385.

H. Bl. 21 Ib.
2 Ch. Ro. 479.

Watson 221.
2 Atk. 251.

Doug. 28. 1 Ch. Ro.
138 Ch. Cons. 818.

B. N. P. 131.
Ld. Ray. 1217.
Comp. 419.
1 Ch. Comp. 387.
2 —— " — 144.
4 —— " — 687.
5 Com. 682.
3 Bac. 176.
179. 269.
B. N. P. 131.
2 Ch. Ro. 176. Stra.
872. n. 870. Ld.
Ray. 1572. 4 Bl.
Comp. 116. 796.
797. Watson 198.
9.

Burr. 1005. Cow.
197. Bl. Ro. 1073.
1 Bl. Bl. 60.

If the money paid [illegible] illegal contract
[illegible] it [illegible] out

1 Ch. Ro. 266.

Contracts.

=tract.

In the last case an action of fraud is in one sense commenced. but an action of fraud is in affirmance of the contract.

Money paid by a mistake under a rule of court, can not be recovered back.

This action will lie on an advertisement offering a reward &c. Esp. 141. Salk. 86. or 26. 7 T.R. 110. B. & P. 124.

It lies on an insimul computassent. It is not absolutely to an action stated that it be signed.

An Ind. Asst. will not lie for money had and received, for a payment made on express contract, still open.

For while it is open, damages only will be recovered and those on the special promise. a fortiori, if the contract is at an end.

If a house be taken by a wrong doer, the owner may bring trover for the house, or if he is sold and not otherwise Ind. Asst. for the price actually recovered or perhaps agreed for, not as the case may be the actual value. Will it be if the house was stolen? this depends on the doctrine of merger.*

An action of Ind. Asst. will not lie, for money had and received, to enforce an unconscionable claim.

For money obtained by oppression fraud, imposition &c. Ind. Asst. lies. Doug. 451. B.N.P. 132. 4 T.R. 485. 561.

So for money paid on an illegal contract. a [illegible] restitution

5 — " — 405. 7 — " — 595. 1 Term. 218. 235.

7 T. R. 635.

13. when the seller had no title as the usage connected with it was merely implied

Stra. 406. 1 Term. 563. 5 T. R. 716.

~~the 14~~ grounded on a good authority — many good on a judgment rather which has been overruled by others, when not

2 H. Bl. 409. 415. 1 — " — 665. 4 T. R. 482. 7 — " — 269. Burr. 1005 —

3 H. Bl. 414. 7 T. R. 269.

Esp. 576. 1 Vent. 318. 332. Burr. 242. 5 — 5 " — 560. B. N. P. 36. O. P. W. 35. Burr. 2388 —

Phas. known. 219. 228. —

Contracts.

of the Pltf. is not *participes criminis* as in case of usury. Doug 171 to 174-405.

It seems now settled, that he is compellable to refund at all events.

Money paid for property to which the vendor had no title may be recovered back in an action of Ind. Asst. or an action might be brought on the case, on the implied warranty.

For money paid under a void authority, and in some cases for money paid in pursuance of a judgment of Court Ind. Asst. lies. But in the last case Ind. Asst. lies not on the ground ~~not on the ground~~ that the Judgment was iniquitous: Say but by reason of some circumstances attending the judgment or some subsequent event rendering it inequitable for the Deft. to retain the money.

The case in Burrows, Moses vs Fairland has been questioned.

If a debtor at Beaufort deliver money to P.S. to carry to his creditor at Savanah, & P.S. does not deliver it, can the Creditor maintain Ind. Asst. against P.S.? Cowp.

It is laid down as a general rule that the Pltf. cannot sue in one kind of action, when he has a remedy of a higher nature. When the object in both would be the same this rule holds, the lower being merged in the ~~high~~ higher remedy. But when the object is different the Pltf. may resort to either remedy.

7 T. R. 181.

Coup. 118. or
198. 1 T. Repp.
135.

1 Doub. 363.
2 T. R. 369.

1 T. R. 227.
7 — 1 — 201. Stra.
915 —

Coup. 197.
Burr. 1984.
2 L. Ry. 1210.
4 T. R. 462.
Bl. Repp. 824.

Burr. 1984.
2 639. 4 T. R.
553. Coup. 55.

6 T. R. 184. Bro.
Ch. 340. Bro. Ch.
67. 240 —

4 T. R. 314. 687.

Contracts.

If money has been paid on a contract written or unwritten for an act to be done, Ind. Aspt. lies for money paid in disappointment of the contract, or an action of damages in affirmance of the contract, for warranty is not liable in Ind. Aspt.

In this case the consideration fails. The rule in the first branch does not hold, when the express contract is still open.

A contract must be disaffirmed if at all in toto.

If a greater sum is demanded than it was pledged for and paid the surplus may be recovered by Ind. Aspt.

While money paid by mistake is in the hands of an agent Ind. Aspt. may be brought him, but not after it is paid over to his principal.

Can the action was be brought against a known agent?

A mere acknowledge of the existence of a debt if it be accompained with a refusal to pay says no foundation for an action of Ind. Aspt.

A bare acknowledgement is never evidence of the existence of a promise. If money has actually been received to the Plfts use and accounted for, money had and received stated generally is good.

In special Aspts. proof of a promise differing thro

A consideration must exist in order to entitle
to a recovery upon an assumpsit now as stated
demurrer - it is illegal demurrer for the word
it does not appear indebitatus thus you may
show it in same way by pleading it or by mo-
ving it on the general issue.

Ld. Ro. 447.

Burr. 2154.
2 T. R. 270.
Lutw. 446.
1 H. Bl. 64. 65.

Esp. 99. Bl. Ro.
2 H. 121. 69.

1 H. Bl. 2 89.
Cowp. 197—

The contract is sworn by a rule of hand
the word of confidence may be pleaded if
reduced to specialty it cannot be done
but the illegality may be shown kind of
persons are entitled word of confidence

Assumpsit the defence will consist either in a denial
of the promise or something will be urged to rebut
shows that the promise is not binding - or that some
thing has taken place since the making of the promise that takes
that there is no ~~[illegible]~~ right of recovery - if you deny
the existence of the promise - you plead non assumpsit
on the 2d of the defences you may if you please
plead non assumpsit and if the promise is proved
you may give in evidence the several matters the general issue
on which this is admissible —

4 T. R. 77—

The nature of the impossibility

Contracts.

slightly from the promise stated will not support the declaration.

The rules which govern cases of Ind: Asst. are principally of mere equity, and any equitable defence is good.

An Asst. on an informal compute agreement, a special promise by the Deft. may be proved.

Action for money had and received lies for money only.

Does it not lie for bank bills?

Pleas to an action of Asst. of matters coeval with the contract.

I. Insanity may be pleaded or given in evidence under the general issue. It is a general rule that in actions of Asst. any thing which goes to defeat the right of recovery in the Pltff. may be given in evidence under the general issue.

II. Coverture.

III. Infancy. In an action brought on covenant ~~[illegible]~~ running with the land against the heir of the Sejor, infancy is no plea in bar.

IV. ~~Illegitimacy of pltff. or [illegible]~~ appearing on the face of the declaration is a good defence on demurrer. But if the illegitimacy does not there appear it must be specially pleaded

Infancy a defence against contracts of
every description except when against the bene-
of covenantors as a covenant running with the
land. The infancy may be ~~then~~ 1st a tenant
of the plea — or a promise when of age to pay
or fulfill the action is on the 1st promise for an
it is void but voidable only 3d a regular
contract of necessary they need not be specified
on this same observation — In case of a tort
infancy is no defence — in case of a common
infancy not exceeding 7 years.
Coverture promise is void generally of course
no subsequent satisfaction cannot bind it but
as to bind contracts respecting her real
property are found that after coverture
she is bound altho's by her compact
and return of a war that she can avoid
yet she can ratify it the real mean
some in this case is barr contracts.
respecting real property can confirm only

2 Bl. Rep. 143.
Doug. 108. 111.
112.

the case of impossible & illegal con-
tracts if disclosed in declarations
demurrer the proper defence if not
behind a special or note may be
plead specially

4 Bac. Ab. 84.
Stra. 1022.
Cro. El. 470.
1 T. R. 462 —
1 H. Bl. 644 —

Contracts.

V. That the contract is idle and nugatory, or is illegal is a good plea to this action. A very large & generally bad question as all

VI. Duress may be pleaded in bar or given in evidence under the general issue.

VII. The want of consideration or that the consideration is past may if the act be covered under a specialty, other than a contract executed as a bond, be given in evidence under the general issue. But if it appear upon the face of the declaration demurrer is a good plea.

This is in case of executory contracts. Be ther a good defence as between the immediate parties, in case of a specialty?

The meaning of the plea of non Asst. is not that the Deft. never promised, but that there is no duty binding upon him at the time of pleading.

Formerly "not guilty" was holden a good plea in Asst. as a general issue; but now it is not.

At this nul debet is not a proper general issue yet it is ruled by verdict for the Plft.

Of Pleas to Asst. of matters arising subsequent to the contract.

I. The Stat. of Limitations.

By the Stat. of James I. called the Stat. of Limitations

Ep. 262. 4 Bac.
65. 61. Salk. 278.
Carth. 384.

Burn. 2630.
2d. Ray. 880.
420. 744. 401.

Gilb. 126. 7. Dang.
62 J. 2 Ch. R.
150. Carth. 471.
5 Mod. 426.
Salk. 29. Burn.
1099. 2630.
Eno. Ch. 885.
1 Bro. 110. 1 Ch. R.
760. 6—11—184.
1594—11—182.
Eno Ch. 114.
760. 381. 404.
B. N. P. ——

Gilb. 126. 127.
2 Ch. R. 762.
6—11—193. ——

Contracts.

it is enacted that no simple contract shall be binding in law after six years standing.

But the remedy only is taken away, the debt continues. 3 Bac. 157.

It is a question litigated whether a contract upon which the stat. of limitations has run can be so revived by a subsequent promise of performance as to lay a foundation for an action; or whether the suit should be brought upon the new promise. The decisions upon this question have been various, but according to the latest adjudged cases the action may be brought on the original contract.

Mr Bouvier supposes in cases of this kind the subsequent promise operates merely as a waiver of the advantage which the Deft. might take of the statute. but that the Pltff. is at liberty to ground his claim upon the subsequent promise if he pleases.

Various opinions are entertained as to the ground on which a debt is taken out of the stat. of limitations. Some eminent lawyers are of opinion, that the debt is taken out of the stat. on the ground of indebtedness. But this cannot be the case; for when one acknowledges a debt but refuses to pay it, the debt is not revived. Gilb. 126. 127.

But if there had been a bare acknowledgement without a refusal the debt would have been taken out of the stat.

Dum. 1099. Cow. 548.

Cowp. 548.
3 T. R. 44.

Gilb. 126. 8
6 Mod. 310.
2 Show. 126.
2 Vent. 151.

3 T. R. 454.
4 — 519.
2 Vent. 550.
Esp. 152. 2 H.
Bl. 340.

3 Mod. 312.
1 Sid. 415. Dev.
91.

4 T. R. 300.
1 Wils. 134.

4 T. R. 419.

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The acknowledgement of a debt is evidence of a subsequent promise. 5 Mod. 426. 6 — 11 — 110. Carth. 470.

It is the opinion of others that it was the opinion of others, that it was the intention of the Legislature to bar all debts on the presumption that they were paid.

If this were true, no advertisement to discharge his debts, by a debtor, or devise giving property for the payment of his debts would revive a debt once barred which is the case.

The true ground Jos. Mr. Reeve supposes is that of waiver and for what amounts to a waiver. Ld. Ray. 4 Ca. 1101. 2 T. Ro. 766.

A contract is waived by the act of one of two joint debtors &c., payment of part or a promise by one, or acknowledgment.

The stat. of Limitations begins to operate on simple contracts from the time at which the ~~time~~ right of recovery ariseth.

There is a proviso in the stat of limitations that operates in favor of Feme Covert, infants, persons beyond sea &c.

But Mr. Reeve supposes that the rights of the persons thus excepted, would not be affected would not be affected by the stat. if there were no proviso.

But notwithstanding the proviso if the stat. begun to run upon ~~the stat~~ a contract it cannot be taken out of the stat. in favour of the persons excepted in the proviso.

If one of several joint creditors is within the

The stat. does not operate when the contract is one implied but

2 Vent. 345.

2 Bl. Bl. 562.

A declaration counting on a promise to Pltf's testator on which the stat. has run, is not supported by proof of a subsequent ~~express~~ promise to the Pltf. himself.

6 Mod. 310

3 Bla. 15

Cro. Ja. 354.
650. 6 Co. 44.
1 Saund. 2. 426.
1 ~~Vent.~~ Vern.
492. Porter.
145. 2 Bl. Bl.
31

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Boedlin, the statute attaches tho' the others are abroad.

There is some contradiction in the authorities as to the question whether the stat. effects an Ind. Apt. or not. The rule however appears to be thus. If the Ind. Apt. is founded upon contract, the stat. extends to it; otherwise it does not.

If the Ind. Apt. be for a penalty imposed by the bye laws of a corporation it is not effected by the stat.

The stat. does not effect a running account where the demands are mutual and creditors and creditors have been given within the time limited. 6 T. Ro. 189 - or 139.

A title to lands cannot be acquired by any length of quiet possession, if such possession was founded on mistake of the parties in making partition.

II. Accord & Satisfaction

Accord and satisfaction agreed upon between the party injuring and the party injured which when performed is a bar to all actions on this account.

Accord and Satisfaction cannot be pleaded in bar of a bond when the right of recovery grows out of the bond itself independantly of any collateral matter, tho' it is a good defence against an action brought to recover damages or a compensation for

4 Dec. 84.
Gilb. 192-

2 Feb. 86-

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non performance of the condition.

According to this rule it would seem that accord and satisfaction is a good plea to all other than single bonds, that is, bonds without consideration —

It is said that the deft. may plead accord and satisfaction of the money due on the Bond itself —

Accord & made before a right of recovery has attached may be pleaded in bar of an action grown out of the bond itself.

A title to land cannot be effected by ~~an accord~~ accord &c.

II. The ~~of~~ satisfaction must appear to be full and ample, or at least the contrary must not appear. Therefore a payment of a less sum of the same species of property, in satisfaction of a greater is no satisfaction &c — which can bar an action unless the time, place or other circumstances are altered in favor of the creditor.

Any compensation of which the value is not self evident less than the sum due, may be a full and ample satisfaction, if given and received as a satisfaction. But when the thing which is due and that which is given in satisfaction for it, are of the same species, the difference in value if any will always be intuitively certain or evident. Where they are different disparition value is not regarded —

An equity of redemption, or any other more equitable claim or it is of no value in contemplation of Law, cannot be ~~considered~~

1 Rolle 124. 7 Resp.
79. Co. Litt. 61.

Yelv. 186.

Sd. Roy. 122.
1 Roll. 129. Stra.
426. 571.
9 Resp. 79. 2 Co. 2.
193. 2. T. Resp.
27.
5 — 11 — 142.
T. Roy. 450.

Stra. 571.
T. Roy. 450.

2 H. Bl. 319.

9 Co. 79.
Cro. Eliz. 304.

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the consideration of an ~~accord~~ accord &c. of a legal claim.

II. The ~~st~~ satisfaction must be valuable - Courts will not make enquiries into the value of the articles given in satisfaction -

III. The satisfaction must be certain for if it is left to uncertainties by the parties so that it will not amount to a binding contract by and between the parties it is not good even after acceptance -

IV. The whole satisfaction must ~~contain~~ be received actually be received in order to bar an action. Tender of the thing agreed on as a satisfaction would not bar an action -

Great inconveniences may arise from this rule, when the accord is executory -

When the accord is so formed as to be in the nature of mutual promises it has been adjudged to be binding without acceptance -

An accord to give or perform any thing at a future time, is no bar to an action before that day arrives for at the day the creditor might if he chose refuse the satisfaction.

If part of the accord has been executed and the residue tendered and refused, it is no bar.

In a plea of accord ~~&c~~ it is necessary to state that the satisfaction ~~stipulated and received~~ was given and received -

2 H. B. 317.
2 L. Ray, 122.

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III. Awards.

An award is the decisions of persons appointed by the parties injuring and injured, arbitrators of a dispute concerning personal ~~chattles~~ chattels or personal wrongs.

A mere award is not a ground of action.

Upon Eng. principles an award can never pass a title to lands; even if a <u>deed</u> is to be delivered as an <u>escrow</u> to arbi=trators to be given up to the prevailing party, no title would vest by the delivery, since livery of seisen is indispensa=bly necessary to convey lands and this cannot be given by arbitrators.

But arbitrators can award the conveyance of land and if the party against whom the award is made does not convey, his arbitration bond will be forfeited.

If the old duty, that is the right of recovery on con=tract in one of the parties is superseded by the award and a new one created, it is generally the case, that no action can be brought on the original contract or tort.

Yet in cases of this kind, the old cause of action is not in any instance so completely extinguished as to be incapable of being revived. For when a mere duty is created by an award if no ob=ligations have been given to abide by it so that the parties have

Kgl. 192.

24. Bl. 01—

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nothing on which to rely, except the award itself; resort may be had to the original cause of action unless the award be performed at the day appointed.

But if the award itself creates no right of recovery; as if it enjoin the making of a conveyance release &c resort may be had to the original cause of action.

If bonds are given to abide by the award, no resort can be had to the original contract or cause of action.

With regard to bonds submitted to arbitrament: the same rules are adopted, as are mentioned already under the head of awards.

According to Eng. principles no evidence can be admitted to prove payment of a bond, unless the evidence is of as ~~high~~ high a nature as the bond itself an award therefore would be nugatory.

Arbitrators have all the judicial powers of a court of law and of a court of Chancery and in some particulars more than both; they give damages or award a special performance of a contract.

The court of Chancery does not except in very special ~~circumstances~~ cases decree decree a specific restitution of personal property chattels. Yet it is not uncommon for arbitrators to decree such restitution: And the award vests the prop:

The award when made of legates bar
other wise cause the award is set aside as Chancery

Keyt. 7. 190.
22. Keyt. 248.

7 T. Reps. 352.

=erty of the chattels recomplete, that trover might be brought a=
=gainst the person refusing to restore them — Quere. If this rule
is consistent with the other that which declares that when bonds
are given to abide recourse can never be had to the original
cause of action? The preceding rule Mr. Reeve supposes does
not hold in cases when bonds have been given to abide.

Arbitrators have the power of a court of Chancery in
procuring evidence except that they cannot compell the production
of papers —

Criminal and Matrimonial causes cannot be settled by ar=
=bitrators. Neither can they settle the title to lands, or a dispute
growing out of a ~~ab~~ bond only —

A submission to arbitrament may be

II. By parol; in which case an action of debt may be brought
on the award. On an action of Asst. on a promise contained in
on the promise contained in the submission provided that the
award is for a sum of money. But if the award is not for a
sum of money, an action lies on the promise to recover dam=
=ages for the non performance.

If two persons having distinct ~~persons~~ interests, make
a submission on one part and promise jointly and severally to
perform the award; tho' the award against them be several
they are jointly answerable on the promise for the whole

5 T. Rep. 692

7 T. Rep. 79.
8 — 11 — 82 —

7
1 T. Rep. 1 —

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II. Bonds may be given to abide the award in which case an action lies on the bond for non performance.

If the time limited in the bond for making the award be enlarged by parol and the award be made after the time first limited, but within the enlarged time, no action for non performance lies on the bond.

The obligor in an arbitration bond is completely discharged of all obligation by tender and refusal.

III. The submission may be by a written agreement in which case an action may be maintained on the covenant; and if a sum certain be awarded an action of debt lies to recover it.

IV. The parties may by statutes 9 & 10. Wm. 3 make their submission a rule of court.

In this case an attachment ~~may issue~~ will issue for contempt against the party refusing to abide by the award or an action may be had on the award.

A parol submission cannot be made a rule of court.

If an agreement enlarging the time of making an award does not contain a covenant that it shall be made a rule of court, non performance of the award made after the time first limited will not subject to an attachment.

The principles of the Civil Law have been grad-

II.

Cya. 7. 90.
Ld. Ray. 248.

5 Mod. 95. Ld.
Ray. 960. 1097.
Salk. 171.
Keyb. 8. 90 —

VI.

Contracts.

-nally interwoven with the old Com. Law respecting arbitrament. So that this title of the law has undergone an almost entire change -

Thus the ancient and modern authorities are extremely contradictory -

When a submission is by parol, the submission may be with or without a consideration - In all the cases if a sum of money was awarded ~~Debt~~ always lay to recover it -

If a collateral act was awarded anciently there was no rem-edy to enforce it. Afterwards it was established that if there was a promise with a consideration to abide, the award respecting a collateral act might be enforced; but if there was no con-sideration for the promise the award could not be enfor-ced -

At a later period the rule was that if there was a promise to abide, tho' without consideration the award as to collateral acts might be enforced. But now if there is a mu submission tho' there be no promise to abide the award may be enforced -

The law is the same where the submission if the writing is under ~~seal~~ seal, it is a covenant, and the remedy is some what better -

When bonds are given the submission ~~itself~~ may be either written or parol -

Kyd. 8.
Com. 100.

2 Bro. Chan
986

Kyd. 98.

10 Mod. 59.

Kyd. 16.

Kyd. 19.

8 Rep. 90

Contracts.

Bonds are sometimes given to an arbitrator in his own name — They may also be given by third persons —

Respecting agreements between merchants or entering into &c. to submit to arbitrament — &c &c —

A testator cannot obligate a legatee to submit to arbitrament & Nor can a third person in any case lay an other under such restraint

Persons submitting their claims to arbitrament may restrain the powers of the, within such limits as they please, as to award according to law &c

But when the submission is general and unqualified, the arbitrators pose the extensive powers before mentioned —

Some period of time must be fixed within which the award must be made —

The Revocation of a Submission.

A submission to arbitrament is revocable by either party at any time before the award is ~~performed~~ made known — Quere. If the party revoking knows what the award is? A suit at Law cannot be withdrawn after Judgment is known —

Suppose the submission to be by rule of court, can it be revoked?

. . . . . If the submission is by parol the revocation may be

Subrogation is in nature of a power granted of per
& Severed the land
of more than one subsist all must unite
to revoke &c &c

Kyd. 18. 1 Sid.
281—

Kyd. 19.
7 T. R. 93.
8— " — 87. 87.

87. R. 139.
Witn. 129.
2 Atk. 569.
2 Bro. Ch.
336—

Kyd. 248.
1 Bac.

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also by parol.

If the submission is by writing the revocation must also be by writing.

Mr Reeve thinks that in Com. a written submission may be revoked by parol.

The party revoking forfeits his bonds if any are given and the whole penalty is forfeited. but the bond will be chancered

In cases of a parol submission and a parol revocation there being no bond given, nothing could be required according to the old Eng Com. Law.

But in some late cases it has been determined that an action on the case will lie to recover damages for the breach of promise.

Refusal to abide by an award, under a submission made by rule of court is a contempt of court and punishable such.

If a contract of any kind is made with an agreement, that if any ~~controversy~~ controversy happen respecting it, that it should be referred to arbitrators, this is no bar to either to either party's suing at law or equity. 2 Bl. Rl. 606.

A submission is not pleadable in bar to a suit brought on the original cause of action, before the day fixed for making. ~~Can this be law~~?

Salk. 207.
3 Lev. 27.
Keyl. 23 —

Com. 91B.
1 T. Ro. 691 —

1 T. Reps. 691.
5 T. Ro. 6. 7 — n
— 488.

Keyl. 23.
1 Atki. 91 —

2 Mod. 218.

Keyl. 25.
Dyf. 216. 6.

Contracts.

Persons capable of submitting to Arbitrament.

Those persons who cannot contract are incapable of sub=
=mitting to to arbitrament.—

Formerly one bound for an Infant who submitted to
arbitrament might avoid his bond. But the bond is now good

The submission of one Exr. was formerly void but it
is now good—

But if the Exr. obtains by the award less or longer agree
=ter sum than he would have obtained on the former or lost in
the latter case at Law, he shall be answerable for the deficien
=cy in one case and for the surplusage in the other—

If an Exr. be submits to arbitration and the award
is that he pay a sum certain, he can not afterwards aver the
want of assets—

An Eng. stat. enables the assignees of a bankrupt with
the consent of a majority of the creditors, present at a meeting legal
=ly warned to submit to arbitrament—

The submission of one partner in trade does not
bind the other—

If a number of persons agree to submit and em=
=power A. & B. conductors of the business, the submission of
the two binds all—

allowing subpoenas without authority
now set aside by rule of Court
husband entitled as of course,
the property of the wife — 2 Co. Jac. 184
of lands conveyed to — 2 Atk. 287

Kyd. 25.
— 11 — 108.

Eq. C. 600.
Sel. Ky. 248.

6 T. R. 43.

1 Bac. 137.

4 Mod. 175.
2 Vern. 60 b.

Contracts.

If in a submission one is bound for another, the principal must as in other cases answer for the acts of his agent.

Formerly all actions in which the party was to wage his law, died with the party himself. But Expt. he are now liable to a debt on an award made on a parol submission by his testator or intestate.

Tho a bond is not arbitratite yet a bond to abide by an award to be made respecting a bond, is forfeited by non compliance.

If in case of a submission of a bond to arbitrament the submission is by parol, yet an action on the cafe lies for non compliance.

When a right of action arises from some injury or default subsequent coupled with the bond the controversy may be settled by arbitration.

Who may be Arbitrators.

All persons except Lunatics, Idiots, persons of non sane memory, Infants, and persons attainted of high treason or felony may be Arbitrators.

May not infants and feme covert be arbitrators?

Persons interested in the controversy or even a party himself

1 Mod. 175.
2 Vern. 100.

1 Mod. 175.
T. Ray 187, 215.
2 Sanders
12 G. Tom. Jones.
164.

Jones. 163.
3 Keen. 384.
Salk. 71. 2 T. R.
645. 2 Mod.
169. 2d. Ar.
222. Eff.

Keyd. 53, 56.
2 Mod. 169.
2 Vent. 118.
Salk. 70.

Keyd. 54.
Salk. 70. 2d.
Ray 222. 3
Lev. 26 D. 2
Vent. 118.
Keyd. 64.

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may be an arbitrator if appointed –

An umpire is one who is appointed to make an award provided the arbitrators cannot agree, or neglect to act –

A single Arbitrator is called an umpire. Formerly if the power given to the arbitrators and the umpire was so expressed as to import a jurisdiction in both at the same time, the whole proceedings were void, whatever the apparent attention of the parties might be –

Or if the appointment of the umpire was referred to the arbitrators and the appointment was made a moment before the other's authority expired – the consequence was the same –

But now if the arbitrators are vested with the power of appointing an umpire they may choose, during the period fixed for their award if the period in which the umpire is to decide is the same or not. So that the power of arbitrators to choose an umpire where such power is given continues till the expiration of the time in which the umpire is to make his award.

If a person named umpire refuses to act they may appoint another –

The arbitrators cannot decide <u>part</u> only of a controversy submitted and permit the umpire to decide the rest, unless the parties so direct.

In case of a submission to three persons an award

Keyd. 67.

Bonner 57.—

Cro. J. 315.
Keyd. 77.

Peka. 410.
146. Keyd. 78.
12 Mod. 137.
2 Roll. Rep.
214. &c.
Cro. J. 315.
Cob. 218—

Lough. 81. 88.
844. 6 Mod.
175. 2 Atk.
501. 514. 519.
Salk. 550.
Ward. 48.
Cro. Elz. 726.

by two of them, a majority is not good unless the parties especially agree that the decision of the majority is good for the law considers them vested with a joint authority.

Moreover if the parties impower a majority to make an award still if all are not permitted present a majority can not act unless those who were not present wilfully absent themselves.

The award respecting all the matters referred to arbitrators must be pronounced at once.

Arbitrators cannot reserve to themselves any authority to do any future act, or rather to make any future decision after the award is pronounced. It was formerly a question what such a reservation of authority would have, but it is now settled if the subsequent matter of the reservation is within the submission the award is not void: but if it is not within the submission the award is void reservation of authority is void and the award is good.

The ordering of an act merely ministerial to be done by the arbitrators themselves or by others under their directions, or that of an other after the award is pronounced, does not vitiate the award, such an order not being considered as a delegation of their authority.

An award that one should pay the costs of the

1 H. 3. c. 223.

Rayd. 85. 101.
2 Ventr. 519.
Salk. 75.
Carth. 330.
3 Mod. 1028.
Pl. Resp. 645.
3 — 11 — 139.

2 Ld. Ray. 1039.
6 Mod. 221.

action, on account of having been submitted, does not include the costs of the arbitrators.

If arbitrators award that one party pay costs, without defining what costs they would be understood to mean mere legal not equitable costs.

Arbitrators may award costs without any express authority in the submission. 3 T. R. 644.

The award must be conformable to the submission. There has been much dispute in determining what is within and what is without the submission.

It was formerly held that if A. & B. should submit all suits, or all actions, causes of actions would not be included. So complaints were holden to mean personal things only. 2 Mod. 308. Kyd. 93.

But whatever may be the words of the submission if the parties by assent bring before the arbitrators and in fact submit to them any controversies &c. an award respecting them is good.

If a controversy respecting lands be submitted to arbitrators, the arbitrators may award money or anything else in satisfaction of the claim.

Tho' formerly in such cases an award not immediately affecting the lands was void.

1 Sid. 12.
Keyd. 94.

Keyd 96.

Keyd. 98.
Sel. Resp. 475.

Sel. Resp. 1118.
2 T. Resp. 645.
3 — 1 — 526.
1 Atk. 91 —

10 Mod. 101.

Contracts.

So in case of personal disputes, it is now settled that any collateral thing may be awarded in satisfaction. Formerly nothing but money could be awarded in such cases.

An award that one party shall give a bond to secure the sum awarded, has been adjudged good, tho' the arbitrators were empowered to award satisfaction merely.

A direction that the parties should set their seals to the award was also holden good.

If partners in trade refer all matters in dispute to arbitrators have of course power to dissolve the partnership.

Their power to dissolve the connection between ~~the~~ master & servant the same.

The words "all matters in dispute in the cause between the parties" comprise only the dispute arising out of the cause specified.

The word "all matters in dispute between the parties in the cause" comprise all disputes between the parties. Case is necessary in wording the submission.

It was formerly held, that an award, that one party shall defray the ~~of~~ expences of measuring land is good, it being in fact but part of the ~~costs~~ costs.

An award that a bond given subsequent to that of the submission is good; it being virtually the same as an order that

10 Rep. 132.

Keyd. 165.

5 T. Raym. 10-n-

118. Keyd. 103.

104. 1 Ld. 5. Sal.

Ray. 123. Salk.

74-

3 Lev. 62.

any collateral thing should be paid, or given up.

Formerly an award directing a release of all demands, to the time of the award was adjudged void — on account of the possibility that some demand might have arisen between the time of submission and the time of the award.

But now such an award is good unless the party wishing to avoid it, actually shews that some controversy or demand has in fact arisen in that period.

But if such party should have ~~assigned~~ signed a release, in this case not knowing of some private injury which had really been done to him by the other party between the submission and award. Mr Bewe supposes by pleading the whole matter he might avoid the award.

An award directing anything to be done by or to a stranger was formerly void in all cases. But the rule afterwards established was, that if the act awarded to be done to a stranger appear beneficial to the prevailing party or if the act directed to be done by a stranger is one of which the party against whom the award operates can compell a performance the award in either case is good.

An award that one party shall make a payment to ~~one person~~ such person as the other shall appoint is good.

An award directing an act to be done to a third

Kyd. 104.

2d. Ky. 246.
Wilde 2 B. 5 B.
Kyd 25. 26.
10 B. 109. —

Fitch. 180.
144 –

B. Repo. 9 B. Co.
J. 200. 350 –
Burr. 274.
4 T. Ro. 146 –

Contracts.

person is now prima facie evidence that it is beneficial: So that to avoid it, it is necessary for the prevailing party to shew that it is of no benefit to him. The unsuccessful party in this case has no cause to complain.

For it is immaterial to him whether he performs the act awarded, to the party or to any other person.

As to an award directing an act to be done by third persons, the rule still remains as stated above.

If an award is to be made where there are several persons interested on the respective sides: the arbitrators may award according to the rule laid down between two or more of them Quod Minus.

According to the old rule of law an attorney submitting to arbitrament for his principal, bound his principal only; tho' he may bind himself now if he names himself as obligor.

If an award orders a release of all claims by one who is trustee of a bond, for the use of an other, this bond is not included in the award unless it was itself the subject of the controversy.

If the parties submit all controversies to arbitrament with an ita quod and one controversy only is decided, it is notwithstanding a good award, even tho' the

4 T. R. 146.

Kyd. 114. 117.
120. Hob. 49.
Cro. Ch. 216
1 Freem. 32. 2a
1 Roll. 798.
Cro. E. 854 —

[illegible]

2 Rep. 94. Cro.
J. Croo. 355 —

Contracts.

were other controversies actually submitted submitted, provided no other was actually brought before the arbitrators.

An award in this case is no bar to actions in those cases which were not decided; and the fact that one only was heard may be proved by parol.

But if in case of such submission more controversies than one were actually brought up before the arbitrators and one only decided, the award would be void. And in cases of this kind the presumption of law is, that there were no more than one cause submitted between the parties.

This presumption arises where all controversies are ~~decided~~ and one only is ~~is~~ decided.

But if the arbitrators declare that they will decide on one or more of the disputes only, the award is good.

If no ita quod, an arbitrator it seems may omit to consider disputes laid before him or not.

When certain controversies specifically described are submitted with an ita quod to arbitrament if any of those which were specified in the submission are omitted in the award the award is bad.

If when specific controversies are submitted with an ita quod, others ~~were~~ decided and none of those

Loyd. 122.

8 Rep. 98.
Barnard. 216.
Loyd. 120.
Cro. J. 200 —

Loyd. 122.
7 Co. Rep. 73.

Contracts.

which were expressly mentioned are omitted, the award as to those which were specifically mentioned ~~are omitted~~ is good unless there was an offset awarded between those which were expressly mentioned in the submission and those which were not.

When reference is by rule of Chancery no such distinction between cases of ita quod, and others, obtains.

If specific controversies are submitted without an ita quod an award deciding a part only of the controversies submitted is good.

And thus it would seem even tho' other controversies are actually brought before the arbitrators.

If controversies between A. & B. on one part and C. on the other are submitted without an ita quod and no controversy is brought up before the arbitrators except one in which B. & C. ~~are~~ only are interested the award on this controversy is good: Otherwise if there had been an ita quod.

Requisits of a good Award.

I. An award must not be against law that is an award directing some unlawful act to be done is ill.

1 Sid. 12.
2 Vent. 243.

Kyd. 123.

3 Lev. 153 —

78. Rep. 73.
Burr. 227 —
Cro. J. 482.
560. Kyd. 82 —
90. 12 G. Cro. J.
400. 902.
Salk. 71. 5 Co. 77.
1 Bennet. 34.
151. 463. —

Cro. El. 883.
Cro. J. 423.
2 Saund. 292.

Ld. Ray. 234.
12 Mod. 585.
586.

Contracts.

An award giving a remedy for that for which the laws affords none was formerly ill.

II. An award must be possible to be performed. For the legal import of the word "possible" see Contracts back. Yet an award that B. promise for C. a deed or pay a certain sum of money, is good tho' it may be impossible to procure the deed, for the award is in the alternative.

III. An award must be reasonable, therefore an award that one shall serve the other is void, for it is unreasonable, as infringing personal liberty.

IV. An award that would endanger the person performing it, in law is void.

Upon the strength of this rule an award directing B. to pay money to A. at C's house was formerly void but it is now good.

V. An award must be certain, tho' an award is now good tho no time or place is fixed for performance, the time being in this case according to law a reasonable time, and the place, that in which the successful party is.

The requisite certainty is not reduced to this rule; if an award uncertain in itself is capable of being made certain by averment, it is good. E.g. An award to pay corte thousand=tain is capable of being reduced to a certainty. But if the award

Kyt 90. 190.
185. 2 Kell. 97.
92 –

Stra. 903. 19. K.
78. 6 Mod. 232.

Hob. 49. 2d. R.
246. Cro. Chf
354. 1 Lev. 182.

Com. 324.

1 Roll. R. 362.
2 — " — 192.
Cro. E. 663 –

Al. Rep. 1117.
Ryd 119. 4. 92.

cannot be made thus certain by agreement, it is idle. Eg. an an award to pay what is reasonable

VII. An award must be final by this rule is meant that an end must be put to the identical controversy submitted.

VIII. An award must be mutual: formerly an award was not good unless something beneficial was awarded to both. At a later period the rigor of this rule was relaxed and then it was adjudged that it was not necessary, for something to be awarded to both sides: but it was still required that if something was awarded to one party, the particular thing for which the award was made should be formerly specified.

The former part of this rule ~~was~~ is now wholly discontinued and as to the latter, it is presumed that an award made on the submission of any controversy is intended as a satisfaction of that particular injury out of which the controversy ~~arose~~ arose.

Formerly when several controversies arose and were all submitted and an award was made "that all controversies ~~were~~ should cease" the award was void because there might be other controversies subsisting. Such an award in such a case is never good. For the award is understood to contemplate no other controversies than those submitted and no other are affected by it notwithstan

3 Mod. 304. 6
— 11 — 282. 10 —
1 — 201. Lev. Rep.
115 — 2 Ch

Geo. J. 7 & 5 Ed.
Geo. 7 & 10 Mod.
201. Keyl. 158.

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=ding the generality of the expression—

A release to the time of the submission is now a good performance of the award commanding a release to the time of the award—And if in obedience to such an award a release of all such demands to the time of the award should actually be given; stett the release would operate on those controversies only which subsisted at the time of the submission.

In some cases if part of the award is void the whole is of course void. in others this consequence does not follow

It is a rule if there is uncertainty in the award in the award and that part which gives satisfaction to one side for what is awarded to the other, is void, the whole award is also void, Ex gr According to the law as it formerly stood, if A were awar=ded to pay costs to B. and in consideration of this part of the award B. was commanded to pay £100. to A, the whole would be void; because formerly arbitrators could not award the payment of costs and costs in this case constituted B's satisfac=tion—

In some cases also when the award is in favor of one side only the voidness of a part vitiates the whole: Ex gr If ~~arbi~~ arbitrators decide matters not submitted and award an aggregate sum in favor of one party the whole is ill. For there might have been ~~given~~ no or damages given if they

Kyd. 1662.

2d. Ky. 115.

had decided only those controversies which were submitted. Yet if in this case the particular sum awarded for each injury had been kept distinct from the rest the award would be good as to the controversies actually submitted and void as to the others —

A governing rule laid down under this head, is this by Mr Roeve. If the justness of the case is or may be effected by the award, made on the controversies not submitted, or by that part of the award which is void the whole award is bad.

But if the justness of the case cannot be thus effected the award as to the controversies thus submitted may be good and as to the rest void — As if what is awarded to one party is void and that which is awarded against him is good in this case if the party mentioned can receive the full benefit of what is awarded to him without its being actually performed, the award as against him remains good. Eg. 1st —

If the award be that B. make a release to A. that A in consideration of the release pay B. a certain sum, and the award as to the release is void; yett the award as to the sum to be payed by A. is good —

For the award itself is as good a security to A as a release —

Pro. Con. 218.
Kyd. 177.

Cro. J. 482. C
Devon. 62. 2 Leo
6. Kyd. 166. Ve.

10. Rep. 131.
Kyd. 178.

Kyd. 74. Elwt.
2 40. Sid. 65.
3 Keeb. 125.
Blue. 109.
Owen. 56

Contracts.

If one party has actually received what was awarded to him, he is bound to perform his part, even tho' that part of his award which was in his favor was in itself void.

If one is required by an award to give a bond with sureties a bond in his own name only is said to be a suf=ficient security and he cannot be compelled to do more.

According to an authority in Coke if any part however small of an award, in favour of one party is good and the rest void, tho' it is all given as a satisfaction for what is awarded against him, the whole award against him is good. This authority is denied to be law. 12 Mod. 587.

The dictum that if the submission be in writing, that the award must, is not supported by any authority.

If indeed by the submission the award is required to be in writing it must be written.

How far an award must conform to all the mi=nute requisite pointed out in the submission is not per=haps cable of being accurately defined in every possible case.

The general rule seems to be, that if any formal=ity which adds any solemnity or even the semblance of a solemnity to the transaction ~~of the award~~ be required to attend the award the requisition ought to be observed but if the required formality be a perfectly nugatory

1 Sid. 366. 6
Mod. 84. Kyd.
131.

T. Raym. 181.
T. Ry. p. 169.

Kyd. 182.
197.

Kyd. 184. 201.

Kyd. 184.

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it may be dispensed with.

Performance of the Award.

If an award be substantially tho' not literally complied with, it is a good performance.

If it be awarded that a release be given by one party and that ~~pay the~~ payment be afterwards made by the other the money awarded is of course excepted out of the release.

If according to the terms of the award there is to be any precedency in the performance, the party directed to perform first must on bringing an action aver performance on his part. If there is no such precedency either may sue without such averment.

If a person in whose favor an award is made accepts a satisfaction, different from that awarded, he cannot require any other performance.

Formerly payment at a day even previous to that fixed in the award was no bar to an action for nonperformance. It has since been allowed to operate as a good bar.

Formerly a tender of payment after the day fixed by the award was no bar to an action for breach of the award. Such a tender if made before a right of recovery has attached,

Stra. 908.
1082 or 1082.
Kyd. 188—

Saund. 88.
2 Keeb. 126.
Lev. J. 640.
Kyd. 191. 208.

1 Saund. 88.

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by the commencement of a suit is now a bar.

If it be awarded that A lease to ~~be~~ B. and that there be reserved on the lease £20 per an. and B. fails to pay at the end of the year, such failure is no breach of the award, for the original dispute is ~~not~~ now at an end, and if A does not pay he is guilty of a breach of covenant on the lease, but not for the breach of the award; the same would be the consequence if a bond were awarded and being not given, were not paid according to the condition.

For the learned reasoning respecting a breach of an award, that a rule pending and submitting during the term should cease Vide Kyd 188 Yelv. 35—

The remedy to compel performance of an award

As to a remedy on a parol agreement Vide ante.

If a suit be commenced for non performance the Pltf. must state in his declaration, the submission, the controversy brought before the arbitrators, the award the breach if it be made necessary by the submission or the award, a request on his part—

When anything is awarded to one of the parties on demand an action for non performance cannot be sustained unless an actual demand be stated and proved—

Kyd. 192.
Dunkins.
264—

Stra. 923.

Kyd. 192. 4 Bac.
92. 114. 124. 135.
Dyo. 281. Cro.
J. 278. Ray.
94. 5 Com. 99
2 Mod. 47. Cro
J. 220. Salk
198. Hob. 198
Hob. 199.
Carth. 136

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If the breach stated is on a bad bo part of the award the dec=laration demurred to.

If breaches are assigned in more ~~that than one~~ parts than one of which some are good and others void and upon issue joined on all, the jury find all for the Pltf. and give entire damages the ver=dict is ill and judgment may be arrested. For the presumption is that part of the damages was for breaches of void parts of the award. But if the damages for the respective parts of the sev=eral breaches were several and distinct.

The verdict as to the breaches of the good part of the a=ward would stand and be ill as to the rest.

As to the remedy for non performance when the sub=mission is by bonds. Vide ante.

Under and refusal it is said in the case of such a bond discharges the obligor's whole duty.

Notwithstanding the rule before laid down, there is an action cited by Strange in which the action was sustain=ed on the award tho' the submission was by bonds.

If when an action is brought on the arbitration bond the Deft. after oyer pleads no award. The Pltf. cannot as in other cases reply that there was an ~~award~~ award; so that the dispute becomes a mere matter of Law. and is not to be sub=mitted to the jury. But the Pltf. must in this case, set forth

Kyd. 178. 250.
2d. Ky. 122 —

Kyd. 192. 210.
204 —

Conv. 294. Cro.
Ch. 126. Kyd.
192. 204 —

Contracts.

in his replication, the whole award and assign assigns the breach - But if debt is brought on the award itself, the Pltff. need not set forth more than makes for himself -

He must also state in his replication an observance on his part of every thing required of him by the terms of the submission.

To this the Deft. if he relies on the illegality of the award must demurr: for the illegality if any is apparent on the face of the award. If however the Deft. intends to deny the fact that there was any award, he will rejoin that there was no such award -

If an award is void in part and good in part, and he against whom the void part is was made would compell performance of the other, he must aver performance on his part notwithstanding the award or against him is void - -

Verdict for the Pltff. and judgment for Deft. see - Selw. 153.

In most cases when an award is set forth by Pltff. & breach assigned - the assignment of the breach ought to be in a good part of the award only. But if the award as against the Deft. is in the alternative of which one part is good and the other part is ill: the Pltff. must assign for breach that neither part has been performed -

It is said in the common place books that in a suit on arbitration bonds only one breach can be assigned

4 Bac. 181.
2 Saund. 279.

1 Bac. 194. 195.

2 Wils. 367.
2 98.
1 Bac. 544—

Kyd. 107. Co.
~~Co. 89.6~~ 886—

Kyd. 166. 207.

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in the replication. Aliter in actions on covenants. The same rule applies in all cases of a suit on a bond given as a security for a performance of any thing.

But it must be taken advantage by special demurrer.

As a single breach occasions a forfeiture of the bond the assignment of one appears in general to be sufficient. But there can be no entertainable reason why the Pltff. may not assign more than one. Indeed from some expressions in Willson there is reason to doubt whether the rigor of this rule is now enforced.

This rule is now relaxed in some cases by stat. 8 & 9 Wm. 3.

If the Deft. after having oyer of the bond, pleads performance or any collateral matter in bar he of course admits the justness and legality of the award, it is therefore altogether unnecessary in this case for the Pltff. to set forth the award.

If the Deft. demur denies the existence of a legal award he cannot afterwards plead performance or any collateral act or matter in bar, for to plead this would be a departure.

If the deft. after oyer states the award and sets forth ~~the~~ averments by averments that there was no other award, this is considered as a traverse of the validity of the award.

If the award be bad in part and good in part the Deft. having stated it as it is may plead performance of the good without noticing the ill part.

Kyd. 2. 08.

3 T. R. 591.

2 T. R. 649.

3 Term. 24. 9. P.
Wm 1 Bd. Kyd
219. P. Ch. Rts.

Contracts.

Tender and refusal of the thing awarded are as good a bar as the thing awarded had it been accepted, but in pleading the deft. must aver that he is still ready to perform.

If the Deft after oyer sets out the award particularly and pleads performance the Pltff. may reply by setting out the whole award and pleading that he ought not to be bound, without that there was no other award than that stated by the Deft.

If the time limited for making the award is by agreement enlarged after the bonds are given, neither party is liable to a forfeiture for noncompliance with the award, if made after the time ~~limited~~ originally limited in the bond.

Chancery will enforce the performance of an award for a collateral thing when the submission was by the rule of that court and in case of an award for money if the award was made under a rule of that or any other court an attachment will issue for noncompliance. In other cases the parties are left to their ~~remedies~~ remedy at Law.

If by an agreement subsequent to the award, a party engages to perform what the award requires of him - Chancery will decree a specific performance, on the ground not of the award, but on the ground of the agreement Chan. will in this case as in all others refuse to compell a party to disclose a fact, which would subject him to a penalty.

Kyd. 223.

Stra. 311. 4 T. R.
589. 2 Atk. 155.
2d. Ky. 867.
Kyd. 226. Ve.

2 Ver. 315.
2 Atk. 149.
Kaz. in Ch. 276
3 Atk. 496.
629. Kyd.
226. Ve.

2 Vern. 705.
Kyd. 241.
239. Burr.
701.
Bl. R. 364.
2 — " — 138.

2 Vern. 506.
351. 101. 151.

Contracts.

Why a court of equity should make this distinction between a penalty and damages it is not easy to discover.

The manner of setting aside Awards.

In Eng. a Court of Law never set aside an award on account of any extrinsic ~~causes~~ circumstances, or corruption, partiality, &c. the reference was by rule of court applied to.

Will courts of law vacate awards for extrinsic causes unless the submission was made by rule of Court?

If therefore a reference to arbitrators was not by rule of court, the award founded on the reference cannot be set aside for any thing extrinsic except in Chancery.

A mistake in law or in fact not appearing upon the face of the award is not of itself sufficient to induce a Court of Chan. to annul an award: And that court will not go into an enquiry on ~~an~~ avowment made of such a mistake. But if the mistake appear upon the face of the award itself. Ch. will vacate it, unless the mistake be on a doubtful point of Law.

Corruption & partiality in the arbitrators is always a ground for Chan. to interpose and set aside awards so if anything appears which renders a rational suspicion of partiality apparent Chan. will vacate an award. So for misbehaviour of the arbi-

2 Vern. 216.
317. 2 P. Wms. 362.
Kyd. 2 38—

1 Salk. 64.
Burr. 701.
7 T. Re. 70. 72 n.
8 East 6—11—161.
1 Salk. 77. 64.

Kyd. 209.

Kyd. 241.
2 T. Re. 781—

Kyd. 248.
Sel. Pri. 246.
Salk. 69.

trators is always a ground for Chan. to interfere and set aside awards. So if any thing appear which makes a rational supposition of partiality apparent - Chan. will vacate an award - So for misbehaviour of the arbitrators. So at law where the submission is by rule of court. Burn 55.56.

If any important fact is concealed from the arbitrators by either of the parties, and the arbitrators or one of them will swear, that a knowledge of the fact concealed would have altered his or their opinion: Chan. will vacate the award on presumption of fraud —

But if the arbitrators in the case should swear that the knowledge of the fact would have had no effect upon the award: Chan. will not vacate it.

When an award is made under a rule of court, if the arbitrators were ignorant of some important fact which could not be brought forward: the court will on motion recommit the award of the Arbitrators for reconsideration.

In what cases the Pft. may sue on the original cause of action.

Whenever a new duty is created by the award, no resort can be had to the original cause of action till after the time

Ed. Rg. 112.

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fixed for performance: But if one party by neglecting what was enjoined upon him, treated the award as a nullity, the other might do the same and sue upon the original cause of action. Quere if bonds are given.

Formerly when a collateral thing was awarded or no new duty was created it might become necessary, if the award was not complied with, to resort to the original cause of action not if there was an obligation created for there was a right of recovery on the obligation. But as the law in this respect is altered it is probable in this as in all other cases where a new is created by the award, no suit can ever be brought on the original cause of action, but each party must in case of non compliance, sue as pointed out before. Quere. If obligations are not given, vide ante.

Formerly when no duty was created by the award, but the old one was extinguished: tho' the award itself could not be pleaded in bar of an action grounded on the original cause of ~~act~~ action complaint: yet the thing awarded might be then pleaded as a release. If a new duty was created the award itself might it be pleaded in bar. Quere, if no obligation was given, vide ante

It is said that if one of two persons should pay damages for the trespass, by an award of arbitrators the award may be pleaded in bar of an action against the other trespasser, if the award has been performed.

Com. 828.

Swift.
Doug. 659.
5 Bac. 27.
Stra. 576.
2 T. R. 24.
Com. 156.

1 H. Bl. 24

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But the efficacy of such an award as a plea in this case appears to depend wholly upon this circumstance of the satisfaction received and not at all upon the operation of the award itself. For before satisfaction of the party injured was received and accepted such an award cannot be pleaded in ~~such a case~~ this case.

There is an old adjudication that after a submission and before an award made either party can recover on the original action without an express revocation. The bring of a suit not be being considered as being a revocation. Quere.

IV. Tender

Tender is an offer to pay a debt or perform a duty.

Tender is a good plea in bar to all actions in which the damages or demand are one certain, or capable of being ascertained by any determinate rule as in debt. So in an action of Ind. Asst. on a quantum valebat, the market price may be ascertained. In trespass also if the damages are one certain as being fixed by law, or ascertained by the parties. Tender may be pleaded. But in all actions, where from their nature damages are uncertain tender is a bad plea.

In replevin the rent averred for, may be paid into court

1 Sec. 191. 2—
— 23. 5 Com.
236. 250.
254. 1 Roll.
465

1 T. Ro. 465.

2 T. Ro. 27.

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it being certain - Salk. 597, Barnes notes 429.

Plea that the Deft. that the D. was ready and offered to perform his contract not good 5 Com. Dig. 2 Wils. 74.

If Deft. pay money into court and Pltf. notwithstanding, proceed to trial and a verdict is given against him he is not entitled to costs even to the time of payment into court. Otherwise if the Pltf. does not proceed.

Payment of money into court is an admission that the Pltf. has a right of recovery to the amount of the money paid in, but as to any further sum he is at liberty to contest contest.

If a tender is made and the tenderee when sued being the money into court the Deft. is entitled to costs it has been a question, who after the money is tendered is the owner of it.

It is unquestionably law that if a note is given for any thing but money a tender discharges the note and renders it incapable of being recovered and that the property tendered is a constructive property of the tenderee. Nor in this case is the tenderor under any obligations to keep the thing tendered as Bailee for the tenderee.

But when the note is given for money it is contended by some that the tender does not discharge it, for that

1 Bur. 419.
Id. Rep. 264.
5 Bac. 6—

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the rule is sufficiently specious, to enable the holder to recover his money by suit and also capable of being operative, as it originally was, by a subsequent refusal on the part of the tenderor to deliver the money on demand.

Whereas if the note was extinguished, it could have no efficacy, even if it could be revived by matters ex post facto &c.

But Mr. Reeve supposes that the note for money is in fact discharged and the property in the money vested in the creditor by the tender.

But the tenderor is by law constituted a bailee to keep the money and that he is not permitted to avail himself of his defence unless he will deliver the money in court.

It is also opposed to Mr. Reeve's opinion that the suit must always be brought on the note. Whereas if the property vested by the tender in the creditor some other action would seem more proper.

To this it is answered that the reason for bringing the action on the note, is, that the law will not suffer the Creditor to recover his money without bringing such a suit, as will lodge the note with the court; that at a future time, it might be brought forward against the tenderor. Yet in cases where other articles than money are tendered and refused - the tenderee may if the articles are afterwards

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kept by the tenderor and not delivered on demand, sue for them in tro=
=ver instead of bringing his action on the note. The reason of this diver=
=sity in the two cases, appears to be this; The tenderor of money is
by law obliged to keept it till it is demanded by the tenderee.

And as the tenderor is thus made liable to be called on he ought to be answerable in the manner which is most for his ben=
=efit.

But as the tenderor of any cattatural thing as cattle &c is under no obligations to keep the articles tendered the law does not shew him such indulgence for he is not liable to be called upon at all except for his own folly in keeping as bailee articles which he is not required to keep; And if he will make himself liable, the tender=
=er is not obliged to sue on his note. With regard to the prin=
=cipal question principle question whether the note is discharg=
=ed by the tender of the money there are no Eng. adjudications directly in point. There are however two cases in one of which it was determined that the note drew no interest after the ten=
=der, and in the other that a loss a ~~depredation~~ depreciation in the value of the money should be borne by the tenderee.

To consider the note as reviving by default, tho' not altogather agreable to technical ~~nicety~~ security is not abs=
=surd or unnatural - As a stat. repealing a stat. revives the first -

Burn. 1364.
Burns notes
2 Bl. 797. R. 52.
formerly contra
Salk. 597.
Str. 422.

Contracts.

With respect however to the principle question the most rational opinion seems to be that the note does not revive on a subsequent demand by the tenderee, and refusal by the tender=or. But as in this case he neglects his duty as bailee, he should not be allowed to avail himself of the discharge created by the tender, unless he continues to do what the law of him he shall not avail himself of the advantage which the law has put in=to his hands.

In some few cases the tender is a good plea where the damages sought are uncertain, as in the case of an invol=untary trespass, tender of sufficient amends before action brought is a discharge. 7 B. & C. 54. 1 Wils. 120—

What are sufficient amends must be determined by a Jury. It is supposed in those few cases in which tender is a good plea in trespass it is by stat. and not by Com. Law. Quere.

After a right of action has accrued tender is not at Com. Law a bar to an action (by stat. Quare)

In Eng. any Deft. having leave of court may bring debt Cost to the time of his application for leave into Court and shall operate as a tender—

It is a rule not to permit Deftrs. to pay money in=to court unless the justice of the case requires it.

By an old rule of law money due on a personal debt

4 Rep. 120.

2 W. Bl. 31.
1 Vern. 192.
Porter. 145.

2 Leon. 209.
3 — n — 104.
3 T. Ro. 684.

5 Bac. 4. 5 Co.
115.

Stra. 916.
5 Rep. 113.
3 T. Rep. 683.

Doug. 14.

5 Rep. 114.

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(which is defined to be such a duty as the party bound may perform at any time during his own life) must be tendered if at all by the original ~~de~~ debtor himself and not by his Ex^tors or Heirs.

In all other cases a tender by an heir or Ex^tor is as good as one by the testator and it is probable that the last rule would now be disregarded.

An offer to pay a debt on condition that the creditor will give a receipt for it, is said to be good in case of a single bond not of a conditional one Quere. Is it good in any case?

To make a good tender money must be actually offered. It is not sufficient for the debtor to say that he is ready to pay.

It is not necessary actually to produce the money if the creditor declares that he will not accept it.

Tender of more than is due is now good.

If a man engages to deliver one of two things, at the obligee shall choose, a tender of one is no bar to an action.

But if the declaration is not then given to the obligee Mr Reeve supposes that a tender of one would be good. But as to this point opinions are contradictory.

In Eng. any money made current by proclamation may be tendered.

In the U.S. any current money that is any money

5 B. R. 115.

~~Co. Lit. 208.~~

Co. Lit. 208.
5 Rep. 115.
Al. R. 390.

5 Rep. 554.
Burr. 452.
~~5 Blow. B~~
5 Bac. 6—

3 Bac. 712.
5—11—9. Co. Lit.
211.

Contracts.

usually passing is a good tender.

Tender of money in a bag is a good tender for it is the tender's business to count the money: tender of a large amount in Copper is not good either in Eng. or this country it being unreasonable.

It is said by the old authorities that if an insufficient sum be tendered and accepted the tenderee can have no remedy for the remainder this rule is directly opposed to the equitable rule adopted in the action of Ind. Afl.

If counterfit money is tendered and accepted the tenderee according to an old Eng. authority must bear the loss.

Bank notes have been considered in Chancery a good tender and it is probable that they would now be considered in Law: They have been considered as a good tender in Law, if the tenderee made no objection because they were not cash.

If no place is fixed for the payment of rent tender on the land is good.

The two rules already mentioned as to the place of tender apply to money only.

Bulky articles if no place is fixed for delivery must in general be tendered to the creditor at his dwelling house

5 Bac. 7.

3 Bac. 710. 712.
Co. Litt. 211. Cro.
Jac. 78.

Contracts

In this case is meant the residence of the creditor at the time of entering into the obligation.

Yet in some cases when the creditor has changed his residence the tender must be made at his new abode. The rule of discrimination is this "If it is more ~~inconvenient~~ inconvenient for the debtor to deliver the articles due at the new than at the old residence of the creditor he may tender them at the latter: Otherwise he must deliver them at the new dwelling of the creditor.

The obliger may direct the delivery the delivery to be made at any place provided it is not more inconvenient to deliver the articles there than at the dwelling of the creditor. In some cases the obliger must be at the trouble of transporting the the articles which he claims - As when the goods were purchased of a merchant at his store.

For a transaction of this kind usage directs the delivery.

The obliger must also call on the Ex^tor or Adm^tor as also on public officers for payment.

Tender at a time and place fixed.

If the time fixed be on or ~~about~~ before a partic

Co. Ll. 14.

Co. Lit. 202.
— " — 206.
Salk. 624.
Stra. 787.
3 Lev. 104.
5 Reps. 114.

4 T. R. 172. 174.

Salk. 623.
624.

Co. Lit. 24.
9 Reps. 92.

Contracts.

-ular day, the last day mentioned in the legal time for making a tender. So if the time appointed be on the tenth day of or within a month the last day of the month, following the 10th is the legal time - yet in both of these cases if the parties mention a day before the last the money may be tendered -

The time of day fixed by law for a tender is "the utmost convenient time." which is construed to mean such a time as that the money may be counted before sunset. Yet if the parties at any time of the day fixed the money may be tendered ~~them~~ then -

Query. Is not the last moment early enough for a tender?

If the place is fixed and not the time the debtor must give ~~time~~ notice to the creditor of the time when he could make payment and if the time is reasonable a tender of the money or an attempt to tender is good -

If neither time nor place is fixed but money is payable on demand, is notice necessary?

If bonds notes &c not negotiable are assigned it has been questioned, to whom the ~~assignment should be made~~ payment should be made after assignment.

It is an established rule that the obligor must suffer no inconvenience from the assignment and also that

Moore 87.

Cro. El. 485.

Cro. J. 245.

Cro. J. 246.

Contracts.

the money shall not be paid to the assignor if he is a bankrupt it is incumbent therefore upon the assignee to under the payment of the money to himself as convenient for the obligor as it would be to pay it to the assignor, the obligor will then be obliged to make payment or tender to the assignee.

If A. promise B. to pay money to him for the use of C. the money may be tendered to C. But it is said if A. promise B. to pay money to C. a tender a tender can be made to B. only and not to C.

If after tender and refusal, the tenderee shall call for her money he must demand it in a reasonable manner, the law not obliging the tenderor to subject himself to any great inconvenience.

The consequences of tender and refusal.

In case of a gratuitous mortgage tender and refusal discharges the obligation as well as the right of action. For the obligation is discharged by the tender, and there being no pecuniary duty or consideration the mortgagee has no grounds on which to recover.

In cases of other mortgages Pawns &c the time of the mortgage &c is forfeited by tender and refusal, tho'

Cro. E. 755.
2 Lev. 24.
Co: Litt. 204.
1 Show 12 J.
2 Roll. Ab. 2.

Cro. El. 888.
Cro. J. 245.
Ld. Ray. 685.

the old duty in his favor still remains.

If a single bill is given with defeasance separate tender and refusal of the sum ~~mained~~ named in the defeasance — discharges not only the parol part but the whole duty.

The reason of the difference between a single and a parol bond, as to the effect of tender and refusal is not easy to determine.

So in the case of a bond given when there was no existing duty as in a submission to arbitration by bond and refusal is a complete discharge of the whole.

In some cases a person by making a tender acquires a right: As if A. agrees with B. that if B. pays £10 on such a day A. will grant him such a farm: In this case B. by tendering the ~~£10~~ acquires the same right to the lease as if he had made actual payment and become bailee of the money.

Also where a man ~~contracts this~~ a collateral thing and makes a tender of his service according to contract: In law he would recover actual damages only in this case; the tenderer gains the same right as that he would acquire by performance.

Indeed it is a general rule in all these cases in which a ~~rightd~~ right is acquired by tender, that the right thus acquired by ~~tender~~ is as extensive as it would

Ld. Ry. 687.
Salk. 624.
Cro. J. 423.

Salk. 223. 4.
Ld. Ry. 687.
Cro. C. 848.
Stra. 454.
7 T. R. 191.
7 Co. 10. 1 Sid.
3 Ch. Cas. 581.

Salk. 633.
Cro. Cl. 848.
7 T. R. 191.

Contracts.

have been in case of an actual performance; thus if A contract with B. to build him a house for £100 and at the time appointed tender him his service B. refuses to employ him

A is entitled to the sum stipulated. This rule of law if admitted in its full extent, will operate very inequitably.

The manner of pleading a tender.

In pleading a tender it is not sufficient for the Plff. to aver that he tendered "according to law" but he must plead that he tendered "on such a day and of the uttermost convenient part of the day" "The uttermost convenient part of the day" need not however be stated unless the creditor was absent at the time fixed. The reason of this particularly is, that the questions of law respecting the legality of the tender ought to be referred to the court.

It is necessary to state the refusal, if the creditor was present at the time of the tender: and if he were not present at the time of the tender, his absence must be stated and that the Deft. ~~stated &c~~ tendered &c.

But omission to aver refusal is cured by verdict.

If payment is to be made "on or before" such a day

Salk. 628.
1 Bl. 88.
2 Vent. 109.
Cro. El. 889.
9 Rep. 79 —

Ld. Ray. 254.
Salk. 622

Stra. 597.

Stra. 576.

it is not sufficient to plead "a tender" before such a day but the day of tender must be specified.

The Deft. must also plead in case of money due that he always has been and still is ready to pay the Pltff. and now tenders payment in court.

When the debtor after tender refuses payment, it would on principle be sufficient for the Pltff. to the plea of tender that he ought not to be barred, without that, that the Deft. has always been ready &c but the uniform practice has been to reply at length the subsequent demand and refusal.

If the Pltff. traverses tender and the issue is found against him he cannot take the money paid out of Court tho' Mr Reeve supposes that he does not finally loose his demand but that he may afterwards recover it in an action. Yet by suffering a non suit the Pltff. might have had taken his money out of court.

If a tender is made of collateral things the defendant must plead the time and place but need not aver that "he always has been ready &c"

Tender is always a good plea to an Qpt. or quantum valebat.

It is also a good plea to traver, when brought for the recovery of money. It has been a custom in L. B. of per=

Same rule in
Bl. Ro.

2 H. Bl. 374.
1 — " — 90.
4 T. R. 464.
4 — " — 479.

2 H. Bl. 174.
3 T. R. 685.
3 Bac. 692 —

7 T. R. 164. 184.
2 Bac. 481. n 4.
12 Mod. 203 —
4 Br. 577.
3 Salk. 124.
2 Ld. Ray. 980.
B. & P. 277.

Burr. 9.
1 Bac. 19.

-mitting the Deft. on motion to bring into court cottatteral articles wrong-fully detained.

The practice obtains in cases in which it is apparent that the restitution of the specific articles is the object of the suit rather than damages; or where an involuntary trespass has been committed.

Paying money into court is an admission of the execu-tion of the writing on which the action is brought.

As to the mode of proceeding after money paid into court - vide 3 Bac.

V. Payment.

Payment of a cottatteral thing must be pleaded quo modo.

If a seller of goods takes notes or bill for them, without assuming the risks of their being good and it happens that they are not good, there are no payment.

VI. Bonds given for the same demand.

For authorities to this title see Comp. 129. B. & P. 159. Esp. 164. 3 Bac. 134 & T. R. 479. Co. Ely. 644. 1 Pow. 219. Burr. 9. 1 Bac. 19.

Co. Lit. 232.
1 Kub. 956.
2d. Ray. 690.
Salk. 574.

8. T. R. 168. 171.
11 Mod. 254.
2d. 690. 12 Mod.
551.

Esp. 148. 207.
Cro. J. 170. 200
2 Mod. 241.
Salk. 227.
518. Salk.
224. 5 Ed.
141. Cro. El. 605.
Carth. 519. 2d.
Ray. 515. 518.
Esp. P. 166. 4 Bac.
245. 5 Comm.
235. Co. Lit.
2 91.
292. 5 Co. 70.

2 M. & S. 274.
2 Sev. & Rus.
277.

7 T. R. 708.
Doug. 97.
4 T. R. 94.

Wils 248.

Contracts.

VII. Release.

A release to one of several joint and several obligors &c is a release to all.

Otherwise of a covenant, not to sue one. This is no release even to him. Suppose a covenant not to sue one of two obligors joint obligors.

The term "all demands" in a release comprises debita in presenti solvenda in futuro; but does not extend to demands growing out of the covenant, not broken or to accruing profit as rent &c. Not to arbitration bonds 8 Co. 70.

Courts will however often confine the meaning and operation of such general expressions to the subject matter 1 Pow. Con. 377. 398. 392. Carth. 119. 2 H. Bl. 577 – Ld. Ry. 285. 336, 669. 2 Lev. 205.

VIII. Bankruptcy.

A debt accruing after an act of insolvency, on a contract made before is not bound by the act.

A discharge of a bankrupt partner under the statute 4, 5 & 10 of Ann does not discharge the solvent partner.

Acts of insolvency operate on contracts only not on torts.

1H. Bl. 123.
136.

1H. Bl. 489.
Bl Bem.
2489-3Bl 4.
T. Repo. 128—

Contracts.

An insolvent act in other states has been considered by the courts in Con. as a good bar to an action on the stat. Suppose the creditor lived here?

In the state of N. York it has been decided otherwise: A judgment in one state is indeed a good bar to a recovery in an action for the same cause of action. But this is expressly provided by the constitution.

A person whose estate has been confiscated is still liable on his antecedent contracts.

So that ~~that~~ the confiscation is not a good plea to actions of this kind; tho' if the estate confiscated was applied or appropriated for the payment of his debts and was sufficient, relief may be had in Equity.

Bankruptcy is no bar to an action of covenant brought for rent accrued before.

is a good plea under Stat. 2 & 3. Geo. 2.

IX. Covenants Broken.

The words Covenants, Contracts, Agreements &c are often used synonymous. 1 Bac. 526. 1 Bow. 244.

The word Covenant in its more limited sense means a covenant written and sealed. Dyp. 266.

Esp. 266.

Cro. El. 212.

Stra. 104.
Co. Ent. P. 167.
3 Lev. 429.

1 Roll. 27.
129. 156.
1 Bac. 526.

1 Roll. 27. 199
2 Bro. Ch. 541.
1 P. Wms. 570.
1 Bac. 526.

~~Dyer 2a~~
2 Ath.

2 Pw. 216. 129.
n. ab. 17.
1 Bac. 69. 526.
~~Str. 80. 479.~~

~~2 Lit. 206.~~
~~4 Rep. 12a~~

Contracts.

A covenant may be created by indenture or deed.

If this agreement is by indenture it is sufficient to maintain an action against the covenantor: it is sufficient that he has sealed and delivered it to the covenantee, tho' the covenantee never sealed it himself.

The usual remedy to enforce a covenant is ~~at law~~ by an action at law for damages, tho' debt will lie for a breach of covenant in a deed.

But when the covenant is to "do something in special" as to convey &c execute deed &c the most common and proper remedy is by bill in Chancery to obtain a specific performance.

In cases where there is an adequate remedy at law, the party seeking redress will not be permitted to go into Chancery that is it is a good objection to a bill in Chancery that there is adequate remedy at law. If therefore the matter of the bill shews a right to damages on the covenant only, it will not be sustained for damages are not ~~sustainable by~~ ascertainable by the Chancellor's conscience.

But even in these cases, that is, where the remedy is in damages only, if the relief prayed for is merely consequential or collateral ~~to~~ to a ground of relief properly recognizable in Chancery, the bill will be retained, as where

Esp. 266. 4 Co.
86. Co. Lit. 94.

Esp. 266. 294.
Co. Lit. 189.
5 Co. 16. 17—

Bac. 290.
1 Bac. 527. Esp.
267. 1 Vent. 16.
Burrow. Rep.
Ch. 23. Jan.
324. Dec. 91.
241. 2.

Contracts.

a matter of fraud is mixed with the damage. Thus if A. sue B. on a covenant at Law and B. files a bill for an injunction on the ground of fraud and A. files a cross bill for relief on the co=venant, the Court will direct an issue to ascertain the dama=ges if no fraud appears.

All covenants are divided into two kinds, Covenants by deed and covenants in Law. The ~~formerly~~ former are express=ly mentioned or recited in the agreement between the parties; the latter are raised or implied by law. Thus if A. demise to B. for a certain ~~term~~ time the law raises a covenant that the lessee shall enjoy quietly during this time.

This division of covenants arises from the na=ture and form of the stipulation.

Again, covenants are divided into <u>Real</u> and <u>Per=sonal</u>. Covenants <u>real</u> are those by which one binds him=self to pass or assure things <u>real</u> as lands or tenements.

A personal covenant is such as ~~as~~ is annexed to the person and is merely personal, as to do an act of service, to pay money, build an house, &c. This division is derived from a reference to the object of the contract.

No set form of words is necessary to make a co=venant, any set of words shewing the concurrence of the parties in an agreement, are sufficient, Thus if A. wrote

Co. Litt. 141.
1 Ferr. 375.

Plow. 308.

Plow. 308.

Dyer. 267. 420.
80. 5-11-17.
1 Roll. 519.
Dyer. 2. 57 pl.
Carter. 98.
Palm. 388.
2 Mod. 92.

Contracts.

a lease to B. in these words "reserving such a rent" & B. "paying such a rent" &c and B. accepts the lease. Covenant for non payment lies against him tho' the deed be the lessor, and the words the lessor. It is a constructive covenant by the lessee as he accepts the lease.

A covenant may be as to something past, present and future. The covenant is as to something past when one covenants that he has done a thing and if he has not, covenant lies against him. As to something present the case of a covenant of seisin and to something future in common entory agreements, covenants of warranty &c.

Covenants in Law differ from covenants in deed, in this. covenants in deed are founded on the words used as amounting to a covenant express, tho' the words are not the most direct, apt, and explicit. Thus "yielding & paying rent" "reserving rent" as well as the words "covenant agreement &c" are verbal covenants, the covenant being expressed. Covenants in law are implied, not from the phraseology but from the nature of the contract or agreement which is expressed, or from the express covenants. Thus the words demise &c import a covenant in Law that the grantor has a good title, and if the lessee is evicted, Covenant lies against the lessor.

It seems also that covenant will lie, before eviction

42. 80. Carth.
98. 1 Roll. 520.
Esp. 267. 8—
1 Roll. 520.
Esp. 267. 8.

42. 70. Cyb.
175. Esp. 272.
Eno. 2. 675.
2 Mod. 92—

Esp. 268. Co. 2.
2. 14. 42. 80—

Esp. 268. 3 Keb.
465. 1 Sev. 122.

Esp. 267. 2 Com.
560—

Contracts.

for the covenant in the lease &c is a covenant of reason which is vio=lated from the mere fact that the lessor granted what ~~the lessor~~ he had no power to grant.

But covenants in law are restrainable by ~~by~~ covenants express. As a lease by the words "demise grant" &c which amounts to a covenant, that the lessor has a good title and that the lessee shall quietly enjoy, followed by an express covenant against evic=tion by the lessor or any claiming under him, there the covenant is not broken by a stranger's evicting.

In one case it is laid down as the rule that if one lease to an other by the words "I have granted & to farm let" Covenant will not lie on eviction by a stranger; But this must mean a tortious entry, otherwise it cannot be reconciled with the preceding rules.

A recital in a deed of a former agreement creates a cove=nant on which this action will lie. As where it was recited that "whereas it was agreed or has been agreed that A shall pay £1000 &c the deed confirms the parol agreement and intent by recitation and makes an express covenant.

But in covenants in deed if the word covenant is not used, there must be words which import an agreement or the action will not lie; When if the lessee for years covenants to repair provided and it is agreed that the lessor furnish tim=ber; this is not only a qualification of the lessee's covenant

10 Co. 155. Moor. 478. 1 Roll. ab. 518 —

4 Co. 80.

2 Cow. 560. 1 Roll. 518 — a 548.

5 T. R. 699. 1 Bac. 539. Plow. 140. Co. Lit. 46. b. Moor 408.

but a substantial covenant. But without the words "it is agreed" it would be a made condition precedent to the lessee's performance.

If I demise a lease to B. for 60 years with the proviso if B. dies within 20 years his Exr. shall have the premises for so many years as remain, this proviso is a covenant, and not a lease, it is not in the nature of a grant, or demise but of an agreement executory. Besides it is void for a lease thro' uncertainty as to the ~~legality~~ begining ~~and continuance~~ and length of continuance.

If a lessor executes a bond conditional for the performance of covenants not only to those in law as well as to those in deed.

A lease "provided and on condition" that the lessee does some act ~~and~~ is not a covenant, but a condition to defeat the estate; so where a stipulation in a deed is in the nature of a defeasance, covenant does not lie at law.

The construction of Covenants.

It is a general rule that covenants are to be construed liberally, that is that the meaning of ~~the~~ parties is to be sought, without such strict adhearance to positive rules as in cases of deeds or grants executed conveying a present interest.

Cro. El. 7. Ped.
48. Esp. 270.
1 Bac. 529—

1 Lean. 52.
Esp. 270.

Esp. 271. T. Ry.
464. Mk. Bl.
276—

T. Ry. 464. Esp.
270. 1 Bac.
429. 542.

Skin. 89.

Sid. 150.

1 Lev. 102.

Contracts.

-ment. Therefore in many instances a literal performance will not be sufficient.

Thus if A the obligor covenant to deliver a bond to B. the obligee on such a day & being the obligee A. being the obligor ~~and before the day mentioned~~ ~~the obligee before the day~~ sues the A. B. on the bond & after the day and recovers and then delivers on the day he is liable on the covenant.

On the other hand, a substantial performance tho' not a literal one will excuse the covenantor. Thus if one covenants that his son being under the age of consent shall marry the covenantee's ~~dau~~ daughter before he attains that age and he does marry her and afterwards dissents there is no breach tho' there is strictly no marriage, yet this is not a literal performance.

If the lessee covenants to leave all the timber on the land and cuts it down and then leaves it there, it is breach of the covenant.

If A. covenants to deliver a certain piece of cloth to B. cuts it into rags and then delivers it at the time, this is a breach. So where the ~~deft. is borrower~~ is a lessee covenants that the Pltf shall have his grass, and spoils them.

In case of a covenant to pay £30 money not being mentioned it has been gravely holden that a delivery of £30 averdepoise of a cottaterat actiete is no performance.

Where the words of a covenant are uncertain they

1 Sid. 151. Esp.
170. or 271.
1 Bac. 539—

Cro. E. 657.
1 Roll 484.
1 Bac. 531.
Carth. 282.
Salk. 196.
11 Mod. 170.
1 Pow. 288.

Burr. 1687.
1640—

Contracts.

are to be taken most strongly against the covenantor, and most beneficially in favor of the covenantee: for they are the words of the covenantor and he is presumed to have used those which are most favorable to himself. Thus where the Deft. covenants that if the Pltf. will marry his daughter to pay £20 per an. it was holden payable for the Pltfs life. But this must not be resorted to except on failure of all others.

There are certain cases in which an exception in a lease amounts to a covenant by the lessee and others in which it does not. The reason on which this rule rests is, that where persons are agreed upon a thing and words are used to make the agreement tho' they are not apt and usual words, yet if they shew the intention as to the agreement the law will give them effect by construction for the law always regards the intention of the parties.

A distinction is to be observed between express & implied covenants in the construction.

The former are to be construed more strictly than the latter. Thus if one expressly covenants to perform a ~~voige~~ voiage in a given time, he is guilty of a breach unless he performs tho' performance is rendered impossible by causes beyond control.

It is a question whether if a lessee covenant absolutely

*

It is a general rule that covenants are confined in their operations, respecting any particular subject matter, to that which is in being at the time of making the covenant — 1 Saund. 366. Stra. 763. 1 T. Rs. 310 708. Ld. Ry. 1477. Esp. 270. 3. Dyer. 83 —

1 Leo. 68. 1 Vent. 223. 3 T. Rs. 347. Stra. 1191. —

Burr. 1639.
1 Saund. 366.

Stra. 763. Esp. 270.

Salk. 198.
Esp. 270 —

1 Salk. 198.

Contracts.

=ly to pay for a certain number of years and the thing demised be de=
=stroyed, so that the lessee does not have the use of it - a Court
of Equity can give relief one Chancellor has decided that the les=
=see should be discharged. But Fonblanque combats this de=
=cision.

But when the covenant is implied such accidents will
excuse the covenantor, as in case of waste, if a house be destroy=
=ed by tempest or by enemies the lease is expired -

It is a general rule that the performance of express con=
=tracts covenants is not discharged by any collateral matter, for there
must be an absolute performance - But to this rule there are
exceptions - Esp. 198. Salk. 198.

1st. If a man covenants to do a thing which is lawful &
a subsequent statute makes it unlawful.

2d. If one covenants not to do a thing which is unlawful and
a statute compels him to do it, the covenant is repealed. So Imp=
=pose if the covenant was unlawful at the time of covenan=
=ting

3d. But if he covenants not to do an act which was un=
=lawful at the time, a statute making it lawful does not void
the covenant - *

Thus a covenant by the lessee to pay all ~~lat~~ taxes extends
only to such as were in being at the execution of ~~here~~ the cove=

Dum. 225.
Cow. 84 to 92 p.

1 T. R. 621. Co.
Lit. 214. Cro. 2.
280. 2 Roll 42.
1 Bro. 317. 2
Vent. 540. 2.
P. W. 608.

Cro. C. a 2. 352.
1 Show. 46.
1 Roll. 939. 3 Lev.
41. 4 Bac. 285.
1 H. Bl. 10. Hob.
10. Carth. 63.
Salk. 573. 2
Bro. 255. T.
Ry. 137. or 137.
393. 413

1 T. R. 446. 8 —
— 170. 1. Cro.
2. 852 —

1 T. R. 602

Contracts.

=nant: not those of an other ~~kind~~ kind imposed afterwards.

A covenant contrary to law and good policy is void. This rule is applicable to all contracts. 1 Pow. 164. 176. Burr. 2255. Cow. 341. 729. 3. T.R. 17.

A covenant is implied in the assignment of every chose in action. 4 T.R. 621.

At Com. Law choses in action are not negotiable yet they are often assigned and such assignment is an implied covenant by the assignor, that the assignee shall have the benefit of them.

If then the assignor receive the money due or release he is liable on the covenant. 1 Mod. 113 2 d Ray. 683. 1242. 3 Keb. 304.

An assignment of a chose in action need not be by deed and of course may be by simple contract or by parol since there is no difference in point of solemnity between an assignment by simple contract and by parol.

A covenant not to sue a debtor for a certain time is no bar to an action. But the covenantor by suing in the time makes himself liable on the covenant. The reason of this rule is that if the covenant is construed to be a temporary release, it would be a perpetual bar for a personal action once suspended is forever gone.

But a covenant not to sue at all is a bar. It supersedes a release and may be so pleaded.

This rule is adopted to prevent a multiplicity of

2 H. Bl. 602.

B. & R. 168. 171.
Sd. Ry. 690.
11 Mod. 254.

Sd. Ry. 690.

1 Roll. 939.
4 Brac. 266.
Carth. 64. 211.
Comb. 123.
Holt. 619.
1 Show. 46.
330. 350.
2 Show. 446.

4 Co. 80.b Esp.
266. 1 Roll.
519. 2 Mod.
92. Dyer. 257.

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nite to produce the same effect, for if a creditor should sue=
=ue he would be compelled to pay the whole –

But a covenant not to sue at all one of two joint and
several obligors, is no bar to the other no it seems to the covenan
=tee.

But if the obligor is only joint a covenant not to sue
one of two joint obligors, is I suppose a bar as to the other for
it would seem the covenantor had ~~been~~ himself bound him
=self against all the remedy which he might have upon the ob=
=ligation – Quere –

If one grant to his debtor that he shall not be sued
before such a day and that if he is he may plead the grant
as an acquitance and that the obligation shall be void in
that the debt shall be forfeited, this is a release for the
grant is in the nature of a defeasance on the part of the
grantor –

Covenants used in Conveyances –

In all deeds of conveyance except a quit claim there
are two covenants 1st Covenant of Seisen and 2d. A covenant
of Warranty. These covenants are generally expressed but some
=times implied –

Esp. 299. Cro.
J. 170. 369.
9 Co. 60 —

Esp. 301. Cro.
Sl. 917.

Cro. J. 170.
~~Co~~ 369. 9 Co.
Co. Esp. 299.

Esp. 301. 4 Co.
Yo. 4 T. R. 617.
Cro. J. 315.
1 Ld. Ral. 96. 277.

1 Sid. 466. 2
Saund. 177.

Esp. 302.
4 T. R. 617.
2 Lev. 37 —

Contracts.

The difference of seizen and a covenant of warranty is this, the former is a covenant that the grantor has a title. The latter is a covenant to defend the grantee against all claims. This distinction leads to a difference in the remedy between the two covenants.

On a covenant of seizen the grantee may sue before eviction and it is sufficient that the grantor was not seized.

But on the covenant of warranty it is sufficient to shew that the grantee has not been evicted.

In actions ~~of covenant~~ on covenant of seizen it is sufficient to aver that the deft. was not seized &c without stating who was seized. It is then incumbent ~~them to shew~~ on the Deft. to shew that he was seized &c, which puts the Pltff. to shew higher title in another.

On covenant of warranty the Pltff. cannot sue till eviction. He must also state the eviction, that it was under claim of title or by lawful act: also it must appear that it was under good and clear title.

A lawful right and title in the evictor is not sufficient, for it might have been derived from the Pltff. himself.

But if it appear that the evictor was under older title, from the declaration it need not have been formerly stated to have been so.

4 T. R. 614.
2 Lev. 87.

1 Saun. 177.
1 Sid. 466.

Esp. 301.

Cro. Eliz. 917. 4 Co. 30.

Esp. 373. 4.

Esp. 274. Hob. 35. Cro. Eliz. 212. Stra. 400.

Contracts.

It is not necessary to state under what title the eviction was.

It is however laid down in some authorities that the Pltff. must aver what title, but this is not law. If the words "what title" mean any thing else than "good and older title" the words in these cases were "legal and good title".

The reason why eviction must be stated to have been under title &c, is that the covenant of warranty extends not to the tortious acts of others who are themselves liable.

Stating that the eviction was ~~not~~ by suit is not sufficient, for this ~~might~~ might have been brought by the collusion of the grantee and evictor and thro' the default of the grantee and not thro' a defect of title.

But one may expressly covenant against tortious acts of third persons and the arrangements under "good and older title" ~~are~~ are not necessary.

So a covenant against the ~~particular~~ acts of a particular person extends to tortious eviction by that person.

If the warrantor himself disturbs the grantee even by ~~eviction~~ a tortious act under claim of title, that is by such an act as appears to be an assertion of right he is liable on the covenant and the Pltff. need not state that the Deft. had no title or even that he claimed any, if the act appear

1 Roll. Ab. 21.
Sp. 302.
2 Com. 564.
2 Com. 564.
Dyer 257.

1 Ch. M. 84.

Shep 162.

Sp. 295.
B. N. P. 158.

3 M.
1 Bac 532.
Co. 2. 101.
— " — 104
5 Com. 614.

5 Com. 116.

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from the declaration to be an ejection of right.

The same rule holds where the tortious eviction is by any person included in the covenant as their Exr. &c. So even tho' the heir is not named. 2 Com. 564. Dyer p. 57

A covenant by Exrs. as such for quiet enjoyment against any person whatever is restrained it is said to them=selves, and persons claiming under them, that in the breach must happen by some act of the Exrs. Quere, is this the decision?

The rule of damages in covenants of seisen and war=ranty is different. On a covenant of seisen the Plft. recovers the consideration and interest.

On a covenant of warranty he recovers the consid=eration and all his damages in being evicted &c.

On a covenant of seisen the assignee of the grantee cannot maintain an action against the ~~grantor~~ first grantor, for the covenant was broken at the moment of execution and therefore the right accrued before the assignment & a right of action cannot be assigned.

If ejectment is brought against the grantee, he ought to notify his grantor, that he might appear and defend. Thus when the interest is freehold it is cal=led vouching in the grantor.

The usual mode of giving notice is by writing. But

B. N. P. 188.
1 Keb. 84.
Cro. J. 184.
Carth. 361—

1 Roll. 591.
597—

Contracts.

according to the Eng. authorities writing is not necessary.

Quit claim deeds, contain neither of the above cove=nants, yet in some cases, the quit claimant is answerable for defect of ~~title~~ title in Ind. Aft. for consideration.

The rule is that if the conveyance was a bona fide con=tract of hazard the consideration is not recoverable. If not a bargain of hazard it is recoverable. The deed itself it seems is not con=clusive, that the contract was a bargain of hazard.

If in covenant against two joint covenantors, the Pltff. has judgment by default against one and is afterwards barred as to the other by plea pleaded specially, or if judgment goes against him on general issue. Judgment cannot be entered against either, the verdict abates the action. For the Pltff. declares against Deftts. as being jointly liable and as one is released so of course is the other.

This rule does not hold in actions on torts against two unless a justification is pleaded by one which shews that the Pltff. has no right of action against either.

Tho' the usual action for a breach of covenant, yet in some cases a bill is prefered to a Court of Chancery praying a specific performance of the covenant when proper will be decreed.

So the action of debt ~~might be brought~~ may be also brought for a breach of covenant when the covenant is for

Cro. J. 561. 758.
3 Lev. 429.
Stra. 1089.
B. N. P. 167.
2 Bac. 15—

Esp. 205. Cro. J.
118. 4 La 94.
8 — 1 — 150.
3 — 1 — 22.
Cro. Ch. 175.
1 Com. 107.
Dyer 103. 113.
Cro. J. 115. Salk.
165. 3 Mod.
159. B. N. P.
168. 1 H. Bl.
547.

Esp. 172. 266.
B. N. P. 167—

B. N. P. 168.
Cro. E. 176. 8.
H. Bl. 5. 56.
Cro. El. 118.

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the payment of a certain and determinate sum, in other cases the action of debt will not lie for a breach of covenant.

The rule that debt of covenant lies only when the sum is certain, connected with others, has led to analogous distinctions in the books relative to the actions which will lie on covenants to pay sums of money by different ~~instalments~~ instalments. The following distinctions appear from a comparison of the decisions to be just.

On a covenant to pay an aggregate sum by instalments the action of covenant or Aspt. will lie and the same actions lie for damages when the first instalments become due but debt on the covenant does lie not till the last is due. This distinction is clearly supported by ~~law~~ authorities.

The ground of this distinction is, the difference between the ~~practice~~ actions Covenant and Aspt. lie to recover damages, for every partial breach of the covenant. But the action of debt lies to recover a sum in ~~a~~ numbers. The latter action therefore being upon the whole covenant or contract will not lie until there is a failure of all the stipulations.

On a covenant to pay several sums not aggregate, action lies on failure of the first payment.

In this case the action of Covenant and Aspt. and it is said debt will lie.

3 Co. 22.
10 – 11 – 12 B.

Esp. 205.
1 Atk. 118.
Wils. 80.
Stra. 515. B 14.
Cro. J. 558.
B. N. P. 168.

1 Roll 601.
Co. Lit. 47.
2 Q B.
10 Co. 124.

B. N. P. 168.
Ph. Pl. 148.
Esp. 125.

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On a lease reserving rent in an aggregate sum to be paid quarterly the actions of Apt. debt and Covenant will lie when the first quarter rent becomes due; for rent is an accruing interest and in Judgment of law no debt exists on a contract until the time of payment. Therefore rent for the first quarter only is due till the expiration of the second and of course it is an entire debt and may be recovered in an action of debt.

A distinction is to be taken between a covenant to pay an aggregate sum by different instalments and a penal bond conditional to do the same.

On a bond with a conditional to pay an aggregate sum at different times debt lies for the first breach. For it is a rule of Com. Law that by non performance of any one of the acts covenanted to be performed, the whole penalty is forfeited and therefore the ~~bond~~ whole bond which is an entire sum becomes due.

But the action of debt, lies not on a simple bill covenanting to pay an aggregate sum by different instalments till the last instalment is due, for a simple bill is an entire contract and can not be severed and as debt is the only action which will lie on a single bill the rule will hold that no action will lie till all the instalments are due.

In the case last cited, in Coke when speaking of bonds, evidently meane single bills.

Co. Lit. 292½
18. M. 548.
52 - Cro. El.
807.

5 a 1. Com.
86. Cro. C. 126.
Comb. 297.
2 Wils. 193.
3 Salk. 108.
131. — 4 Bac.
134. 2 Vent.
198. 1 Roll.
172 ———

1 Bac. 544.
2 Wils. 377.
87. R. 126.
81. R. 1111.
1016 —
Comm. 826.
4 Bac. 135.

4 Bac. 135.

1 Pow. 128.
2 P.W. 197.
1 Roll. 519.
Dyer. 14 -

Cro. El. 553.
1 Bac. 539.
1 Sid. 216.
2 Com. 562.
1 Roll. 519.
2 Mod. 269.

2 Com. 568 a
584.

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Several of the preceedings rules as to covenants apply to *mutatis mutandis*.

In action on covenant any number of breaches may be assigned but in an action on the bond only one may be set forth for one breach is a forfeiture of the whole at Com. Law.

From some expressions in Wilson the rule appears to be some=what relaxed. 2 Wils. 267.

Also by stat. 8 & 9 Wm. the Plfff. may assign as many breaches as he pleases on bonds in certain cases that is in cases of bonds, for the performance of covenants in deeds &c.

But even where several breaches are assigned contrary to the rules of Com. Law advantages must be taken by special demurrer for it is mere matter of form in the nature of dis=plicity which is not reached by general demurrer.

And assigning cause of demurrer that the declaration is "uncertain and wants form" is not special enough.

It is a general rule that the Exrs. of a covenantor are com=plied in himself and bound without being named.

But an ~~expression~~ exception is to be taken to this general rule where the covenant is to be performed by the testator personally.

So the Exrs. is bound were in the last case, if the covenant is ~~to be performed~~ broken in the life time of the testator.

So the ancestor seized in fee may bind his heirs, by cove=

Esp. 294.
2 Com. 561.
Ro. A. P. 158.
Co. Lit. 87.
2 Com. 561.
Skin. 305.
2 Lev. 92

Esp. 295.
1 Com. 361.
1 Vent. 176
347

Contracts

=nant. 2 Vent. 213. Dyer 88 b. &c.

Thus if A covenants to sell lands and dies before conveyance, his heir will be decreed in Chancery to convey and the money will generally go to the Exr. especially if the personal property is insufficient for the payment of debts. This is a covenant rule.

It is a general rule that covenants real bind the heir of the covenantor and also descend to the heir of the covenantee.

The heir may sue on the covenant, tho' not named if the covenant runs with the land and appears designed to continue after the ancestors death; as a covenant with the lessor to leave the land in repair. Esp. 294. 295.

It may be questioned whether on principle the heir is liable on his covenant of seisen since the breach must have happened in the life time of the ancestor.

Covenants which run with the land & contra

Leases were assignable at Com. Law and the covenants contained in them were in some cases binding on the assignee while he continued on the premises assigned. So in some cases the assignee may have the benefit of the covenants made of the term to his lessee and ~~an~~ assignee and may have an action on them.

3 Leo. 283.
T. Ry. 208.
2 Vent. 223.
228—

1 Hob. 345.

4 Co. 30. 5—1—
16. 24. Cro. El.
457. 1 Bac.
534— 2 or 3 Com.
564. Dyr. 298.
1 Roll. 521.
Dyer 13.
Moor 319—

1 Pow. 236.
1 Bac 534.
Cro. E. 382
B. N. P. 159.

Burr. 1271.
5 Co. 15. 3 T. R.
393. Cro. E.
583. 2. 1 Bac.
534—

5 Co. 24. Co. J.
125. 309. 521.
2 Com. 564.
3 Lev. 233.
1—11—215.
T. R. 303.
2 Vent. 223.
202

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The assignee is sometimes ~~liable~~ liable on the covenant on the covenant of the assignor or lessee tho' not named therein, he is sometimes liable when named, and not otherwise and sometimes not liable tho' ~~not~~ not named.

The assignee of a lease is bound by the covenants tho' not named if they run with the land.

Covenants are said to run with the land when the ~~thing~~ thing covenanted ~~runs with the~~ to be done, or concerning which something is wanted to be done, was in esse, at the time of the lease and period of the demise. The assignee of the lease is liable on a breach of such covenants happening during his possession tho' not named, as covenant to repair the buildings &c.

So the assignee is liable on a covenant to payment which tho' not substantially, is partially in esse; this then is a covenant which runs with the land or is "annexed to the estate".

But by a covenant on the lessee's part to build a wall, de novo, on the land, the Assignee is not bound unless named, the thing is not a parcel of the demise, such a covenant is said to be a collateral covenant which does not run with the ~~land~~ land.

So a covenant runs with the land if it goes to the support of the thing demised.

When the assignees ~~named~~ are named they are obli-

4 Mod. 71.
5 Co. 16. 1 Bac.
594.

2 Com. 562. 4.
5 Co. 15. 16.
Co. J. 498.
1 Bac. ~~594.~~
594. Foub.
352. Jones
223— —

H. 171. Salk.
699. Burn.
1271. 1 Bac.
334. 2d. Ry.
888. 1 Foub. 350.
2 Com. 565—

1 Foub. 350.
Carth. 177.
3 Co. 22. Salk.
81. 4 Mod. 71.
Nov. 90.
Stra. 1121.
B. N. P. 159.
Hott. 166. 172.

1 Vent. 329.
351—

1 Foub 351. 3.
1 Vent. 165.
87. 88— —

Contracts.

=ged to perform all the above covenants whether they run with the land or not; as a covenant to build a wall on the land &c:

But the covenant in this cap must be to do a thing which relates to the demise. For the assignees tho' named are not bound by a covenant to do an act which does not concern the demise: as to build a house upon other land or to pay a collat=eral sum. For there the act to be done is collateral —

But when the assignee is bound it is only for rent incurred, or covenants broken during ~~the~~ his possession. If the breach was before, recourse must be had to the lessee, tho' the assignee were named: For the assignee is bound on the ground of possession his liability rest not on a privity of estate which continues during his possession only as if a lessee covenants to rebuild within a certain time assigned his assignees are not liable on the covenant —

So the assignee is not liable at law for a breach after his assign=ment: If he assigns the very day before rent is due, he is not liable for any part, even tho' he assigns to a beggar by fraud unless a trust is proved —

It is said in Vent. indeed that "fraud may be replea=ded" But this decision is now overruled —

But Chancery will compell the ~~assignee~~ assignee in this cap to account for the rent while he enjoyed the land —

× 4 T. R. 98. 100. 1 H. Bl. 489. 1 Bac. 505. 1 Foub. 853. 4. Salk. 199.

Pop. 120.

1 Foub. 851.
2 Atk. 219.
548.

2 T. R. 185.
8 — " — 57. 60.
Esp. 276.

3 Wils. 234.
8 T. R. 59. 9.
7 Vent. 85.
2 Eq. Ca. Ab. 100. a 190.
Dyer 6.

~~1 H. Bl. 98.~~
~~4 B. & Cres. 9.~~
~~428.~~

1 H. Bl. 489.
444. Cro. J.
304. 1 T. Bl.
354. 3 Co. 23.

1 B. Bl. 489. 4.
2 Com. 563.
Cro. J. 309.
532. Cro. B.
185. 1 Foub.
854. B. N. P.
159.

1 H. B. 487. 9.
Cro. J. 522.
1 Sid. 447.
1 Foub. 854.
9 or 8 Co. 32.
— " — 22 —

Contracts.

Whether Chancery will in any case restrain the assignee from assigning to a beggar or a bankrupt, is an unsettled point but they will not restrain the assignee if he offers to surrender to the the lessor and the lessor refuses to accept the surrender.

A covenant by the lessee not to assign is binding, tho' this seems formerly to have been questioned.

Such a covenant is not broken by by the lessee's creditors, taking the term in execution, nor by an under lease of part of the term nor by devise of the term Bl. Rep. 766.

* The lessee is always liable to the lessor on the express covenants even after assignment by the lessee. 3 Co. 22. Pow. M. 90.

But if the lessor has accepted the assignee for his tenant, as by receiving rent of him he cannot afterwards maintain debt for rent against the lessee in any case the priority of estate being gone.

Yet if the covenant be express he may have the action of covenant; for in this case priority of contract remains

But if the covenant is only implied by law the lessor shall not have any action, even the action of covenant against the lessee for any failure, after accepting the assignee tho' he otherwise may such covenant being founded on ~~priority~~ priority of ~~contract~~ estate which the lessee alone can destroy.

1 H. Bl. 88.
4 Bg. Cro. J.
~~522.~~

Cro. J. 523.

4 Bac. 279.
1 Fob. 345.
Co. Litt. 215.a
216.
9 Co. 22.
Cro. J. 522.

Stra. 405.
8 Wils. 294.
Bl. Ro. 766.

Foub. 347.
3. Doug. 174.

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The Lessee may accept the assignee, by accepting rent; by assenting to the assignment &c.

Where the covenant is express the Lessor may pursue his remedy on the covenant against the lessee and assignee at the same time, but only one execution shall be enforced. After satisfaction of one execution, if the deft. in the other is taken except for costs Audita Querela lies.

By Stat. 32 Hen. 8. the grantee of the lessor has the same remedy on covenants running with the land against the Lessee as the Lessor himself had at Com. Law.

The Com. Law extends the remedy only to the representatives of the Lessee's grantee, as he had before against the grantor.

A distinction is to be observed between the assignee of a lessee and a derivative lessee.

An assignee is one who takes the whole term or the whole of the remaining part in character of tenant to the lessor.

A derivative lessee or under tenant or under tenant is one who takes a conveyance of part of the remainder of the term, not as tenant to the lessee of the whole.

A derivative lessee is not liable on the covenants in the lease, for there is no privity of contract between him and the lessor yet he is liable for a distress, for rent in the

Doug. 177.

2 Com. 564.
Stra. 407.

4 T. Rep. 77.

2 Com. 561.
1 Vent. 146.
3 Ld. Rep. 295.
2 Lev. 26.
Bilt. P. 158.

Salk. 141.
Dep. 295.
2 Lev. 92.
B. N. P. 158.
159.

2 Com. 563.
1 Bro. 128.
2 P. W. 197.
1 Bac. 597.
Cro. E. 559.
Dyer. 14a.
1 Roll. 97.
40. 519 —

the ground of enjoyment.

The assignees of the whole term are liable on the covenant and according to the preceeding distinctions, whether the assignment was actual or by devise or by sale under execution.

If the lessee covenants for himself and assignees as long as they shall be in possession after the term, he is liable on the covenant tho' not strictly an assignee.

An action on a covenant running with the land against the assignee's heir infancy is not ~~liable~~ pleadable in bar, for tho' an infant is incapable of contracting yet as heir is capable of making satisfaction for a breach of covenant already made.

If A. covenant with B. his heirs and assigns for quiet enjoyment, were in a real covenant, as in the grant of an inheritance and this is broken in B's life time his Ex^tors not named shall have the action. For damages are to be recovered, and they accrued in B's life time and so belong to his personal fund.

If a covenant real is broken after the covenantor's death, his heir must have the action.

It is a general rule that the Covenantor's Ex^tors tho' not named is always liable for a breach happening during the life of the covenantor even in covenants real.

For the right of damages accrued in his lifetime

Cro. E. 553.
1 Bac. 593.

2 Com. 568.
Dyer. 257.a
1 Bac. 593.
Cro. E. 157a
137-

Esp. 296.
1 Wils. 4.
Salk. 309-

2 Com. 564.
Esp. 294.
1 Doub. 367.
Co. Lit. 365.
370 373. 844.

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and would have diminished his personal fund.

Action would also lie against the Exors. tho' the covenant be ~~non~~ not broken till after the covenantor's death and tho' the Exors. be not named if the covenant is express.

This rule is to be taken with the exception of those co=venants which terminate in with the life of the covenantor.

The covenantor's Exors. is not liable for a breach of those covenants happening after the death of the covenantor tho' the covenant be express.

But on a covenant in law in a lease or grant not bro=ken till after the covenantors death the Exors. is not liable. The reason of this distinction, between covenants express and co=venants in law is probable an artificial one, But what it is we are unable to collect from the books.

If however Exors. be come into possession of the lease, in their representative capacity they may be sued as assignees, for breaches during their own possession.

The heir of the covenantor, if named is liable for breach=es, arising either before or after the covenantor's death, if he has real assets otherwise not.

Covenants or bonds to save harmless.

A covenant to save harmless is an engagement by

Sp. 275. 6. 1 Roll
454. 4 Co. 80. Cro.
Ch. 443. 1 Mod.
219—

Ste. 400. Cro. El.
212. Dyer 85. 1 Roll
481. 2 Sev. 87—

Cro. El. 58. 123.

3 Bulst 284.
Salk. 196. 5 Co.
24 & 25 Wills
274. 3 T. Lev. 5.
526— 1 T. Raym.
599. 2—11—100.
640. 379. 714.
5—11—337.
7—11—67——

one to save an other to save one from all harm, trouble or cost, arising out of some collateral transaction.

With regard to such covenants or bonds it is a general rule that they are not broken by a tortious act of an other, as in covenants for quiet enjoyment, wherein the one who is guilty of the tortious act is the trespasser against whom an adequate remedy may be had.

But if the covenant is particular that is to save harmless against the acts of a particular person, the covenantor will be liable even for the tortious acts of that person.

If a sheriff takes a bond to save himself harmless, against one's escape having the liberties of the yard and the person escaped he may sue immediately on the ground of liability and need not wait till sued ~~immediately~~ himself, for the creditor might delay bringing his action against the sheriff till the one who covenanted to save him harmless becomes a bankrupt by which means the sheriff would loose his remedy on the bond.

So if a surety takes a counter bond of indemnity and the debtor faile to discharge the debt for which the surety is bound according to the terms of it, the counter bond is immediately forfeited the condition broken, and the surety may sue on mere liability.

2 T. R. 104.
— " — 105 —

Burr. 1805.
7 T. R. 269.

Salk. 196.
2 Burr. 234.

5 Co. 24.

Coup. 525. 7.
1 T. Rep. — " —
104. — 105.

Contracts.

If the principal has been compelled to pay the surety on the mere liability of the latter and has afterwards been compelled to pay the creditor; Chancery it seems will compell the surety to refund. Mr. G. remarks that he can discover no reason why a court of law might not give relief in this case by allowing the principal to bring an action of Ind. Asst.

It has been objected it is true that this would impeach a former Judgment. But this is plainly contrary to facts. The judgment on the bond of indemnity was strictly just and proper at the time, but something ex post facto gave it an inequitable operation.

If one having obligated himself as surety takes a bond of indemnity after his liability has attached no right of action accrues till special damnification. otherwise it would be absurd, for his liability commences immediately.

If however he had executed a penal bond and taken a bond of indemnity before the condition was broken, it would be otherwise.

If a surety takes no bond of indemnity, but pays the debt of the principal, he may maintain an action of Ind. Asst. for money paid tho' formerly he could not; yet in this case mere liability does not give an action.

2 J. R. 100.

4 Bac. 279.
2 Lev. 206.
Cro. Ch. 508.
2 Jones. 100.
102. 4 Term.
345

But if a bond of indemnity is taken the remedy must be on the bond, for it is a maxim in law that where there were concurrent remedies, that one of the highest nature must be taken and the remedy on the bond in this case ~~if~~ is of the highest nature.

In cases of assignments of obligations &c the obligee may in some cases release after assignment and in others not. The general rule is; that if the obligation or instrument is not negotiable the release is good otherwise not. By the instrument being negotiable, is here meant that the legal interest of the assignor may be so transferred as to vest in the assignee a right of bringing an action upon the instrument in his own name. The reason of this rule is that where the instrument is negotiable, the property of the assignor has passed by the assignment and therefore the release has nothing on which to operate. But where the instrument was not negotiable the legal interest still resides in the assignor of course he may release after assignment.

So if a lessor after assignment of the reversion release to the ~~lessee~~ lessee all covenants &c: yet the assignee of the reversion may recover for all breaches of the assignment, for the covenant runs with the land and is assignable since the stat. 32 Hen. 8, and according to some it was so at com. Law.

But when a lease has been assigned by the ~~assignee~~

Esp. 3 Ch. 5 Com.
235. Cro. Ch.
361. 2 Roll 448.

Esp. 307. B. N. P.
166. Co. Lit. 2 gl.
Allen 38.
Cro. J. 99. 2 Show.
90. 5 Com. 235.
Salk. 171.

Esp. 2 Str. Stra.
814. Eq. C. Abr.
3 170 2 Vern.
Cro. Ch. 108.
209.

Rev. 2 44. 5.
Esp. 2 66.

lessee, he may oust the assignee of his action, for breaches were after assignment, by a release given before action brought: but a release after action brought is not operative, for the right has attached to his person. The first breach of the rule is obviously opposed to the general principle laid down: for a release is obviously negotiable & of course a release by the lessee after assignment ought to be no bar to an action ~~of~~ by the assignee; the rule is well estabtished.

A release before covenant broken of all demands does not release the covenant, because there was no demand at the time of the release, there having been no breach. So a release of all actions, suits and quarels, does not discharge the covenant.

But a release of all covenants before a breach, is good i.e. it is a bar to an action for any subsequent breach.

Pleadings of Covenants broken.

In an action of covenant broken, the declaration should state that the covenant was by deed, this case will lie on an instrument not sealed.

From the above rule "parol covenants" ~~as used~~ as used by Powell seems to be an improper phrase.

1 H. Bl. 263.
5 Co. 74. 5.
6 — 1 — 33. 4 Cru.
109. Exp. 298.
1 Wils. 16.
Stra. 1180. 6.
3 T. Rep. 151 —

Salk. 139. Exp.
298. 2 L. Ry.
478. 4 Ld. Ry. 176.

Cro. J. 869.
9 Co. 60. Exp.
299 —

Cro. J. 848.
Stit. 5. Exp.
299.

3 Ca. & T. Ro. 207.

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Formerly the Pltf. in an action of covenant broken must always make a profert of the covenant, tho' it were lost or in the Deftts possession. But he may now declare on a covenant, or other deed, that it was lost by time and accident.

In this action a breach of covenant must always be assigned when the covenant is general, a general assignment is sufficient of a breach is sufficient. Thus in an action on a covenant not to buy or sell certain articles, in two years, an avernment that the Deft had sold to A. and others not mentioning to whom at divers times is good.

The most general assignment of a breach is, in the words of the covenant, with a negation; as in an ejectment covenant "that the lessor is seised in fee" and an avernment, "that the lessor was not seised in fee", is sufficient.

A breach should be so assigned as to appear clearly to be within the covenant. Therefore in an action on the covenant a covenant by the Lessee "not to cut more timber than is merely for repairs": an avernment that he cut timber to the value of £100 is not good.

If by subsequent words the Pltf passes over the breach first assigned as if he aver "that the Deft. has not used the land in an husband like manner, but has committed waste" He will be allowed to prove nothing more than

Exp. 302. T. Ry. 65—

Exp. 300.

Stra. 232. Exp. 300—

Stra. 229. Exp. 300. 1. 2 Leah. 250—

Stra. 229. Exp. 300. 1—

Ld. Ry. 182. Exp. 301—

that the Deft. committed waste.

When there is proviso in a deed, defeating the covenant in a certain event, the Pltf. need not set it out, but leave the Deft. to plead it. Thus in an action on a covenant to deliver goods &c with a proviso that if the Deft. was prevented by the sea, the deed should be void. The proviso need not be set forth in the declaration.

But if there is an exception in the body of the covenant, the Pltf. must notice it, in assigning ~~it~~ the breach, otherwise it would not be known, that the breach did not fall within the exception.

If the Pltf. sets out the ~~covenant~~ his covenant and assigns an inconsistent breach under a Viz. such a suit shall be rejected.

If the covenant is in the alternative to do one of two things, the breach must be assigned as to both. Thus on a covenant by the lessee not to cut any wood without the assent or assignment of the lessor an averment "that he cut wood without the assent of the lessor" is not good.

But on a covenant "to pay or cause to be paid" an averment that the covenantor "has not paid" is sufficient, for causing to be paid is paying.

If the covenantor is to pay on one of two contingencies, which "shall first happen" an averment that one had

Stra. 228.
Exp. 302.

Salk. 139. Exp.
302. 3 Keeb.
440. 5 Mod.
188.

2 Lev. 124.
Exp. 308
Allen. 19

happened is sufficient without averring it to be the first. Thus on a covenant to pay on the "death or marriage of Sally Stiles" "which ever shall happen first" it is sufficient to aver that Sally Stiles is married.

If the covenant is, that an act shall be done by one or his assines, the breach must be in the disjunctive, that is, it must be averred, that the act has not been done by him or his assines. This rule does not hold where the act=ion is against the original covenantor himself, for then an assignment cannot be presumed that is, it is confined to actions against the assignees.

But on a covenant to do an act, or to convey, to a man and his assigns an averment by the covenantee that it was not done to the covenantee himself is sufficient. If it has been to his ~~assines~~ assigns the Deft. must shew it.

In a covenant for a sum certain there can be no ~~appointment~~ apportionment of the demand and the breach must follow the covenant, that is a non performance of the whole covenant must be averred.

As if one covenants to pay $100 per ton for iron an averment that the covenantee would not pay $50 per half ton would be ill on demurrer.

But if the covenant had been to pay $100 per

Hob. 217. Esp.
304—

Salk. 171. 5 Co. 23.
7 — " — 10th
2 Bl. Rl. 574.

Hob. 88. 9 & 7 Co.
115 Eno. Rl. 849.
1 Bow. 359. Salk.
24. 5 Com. 4th
Stra. 615. 712.
1 Vent. 177.

2 Vent. 156.
4 Bac. 88.

Co. Lit. 308.
Esp. 305. 5 Com.
83. 4 Bac. 91.

5 Com. 236.
— " — 288.
4 Bac. 91—

ton secundum naturam, such covenant would ~~be good~~ have been good.

When the covenant is to perform some act precedent to the right of action he must aver performance; as in a covenant to pay &c "after proof and request made".

So if the precedent is to be done by a third person performance must be averred otherwise it is bad after verdict.

But where there are mutual and independent covenants viz. where A. covenants unconditionally for one thing and B. for another A. in an action need not aver performance; so in all cases where the engagement on one ~~one~~ side is in consideration of an engagement on the other for either party has a right of action before performance.

A plea that the Deft. has not broken his covenant is not good for it throws the question of law, to the Jury. Besides it is bad on demurrer as it amounts to no issue either general or special, nor as a plea in bar, it suggests no new matter.

It is laid down as a rule that when covenants are affirmative, pleading performance is generally sufficient.

This general rule must relate to cases in which the things covenanted to be done are in some measure in

4 Bac. 91. How.
P. 6 — 9

Cro. E. or L. 749.
Salk. 498. 4 Bac.
88. 91. Cro. J.
359. 360

Cro. El. 749.
916. Esp. 305.
17. Ro. 753.
4 Bac. 91. 4.
5 Com. 83. 236.

Co. Lit. 303 b.
Cro. E. 691.
4 Bac. 91. Esp.
305. 5 Com. 236.

5 Com. 236. 83.
Hob. 13. Mod.
855. Cro. El.
232. 3 Com.
236. C. B. 3.

Esp. 305. Co.
Lit. 303.
4 Bac. 91.
8 Co. 13. 3.

=dispensable either in kind or number; or a covenant by a sheriff to return all writs &c or to discharge the duties of his office—

In this case a plea that he returned all writs &c is sufficient, but even here I suppose a plea that he had performed his duty would not be good—

For otherwise the terms of the rule would contradict an other well established rule which is where a Deft. has covenanted affirmatively to do a number of specific acts, he must plead performance specially that is of each act—

The rule that where there are affirmative covenants for the performance of an indefinate number of acts, the Deft. may plead performance generally is established merely to avoid prolixity and broadening the record—

Where some of the covenants are negative the Deft. cannot plead performance generally but he must specially plead specially that he has not done the acts covenanted against. Advantage is to be taken of pleas of performance by special demurrer only—

If the negative covenants are void, he may plead as if they did not exist. Pleading generally in this case is aided by general demurrer—

When the the covenants are in the disjunctive the Deft. must shew he has performed, otherwise it is ill on

Cro. El. 232 –
5 Com. 82. 84.
1 Sean. 811.

Dyer. 229. 5
Com. B. L. Hob.
67. 107. 4 Bac.
92. 9 Co. 25 –

Cro. J. 660.
4 Bac. 92.
Co. Lit. 608 –

Carth. 395.
1 Sean. 71.

Carth. 394.
3 Mod. 244.
Cro. E. 485.
5 Com. 236 –

Carth. 395.
1 Sean. 71 –

general demurrer - tho' according to some it is ill on special demur=rer only - 4 Bac. 95.

When the covenants are to do some matter of law as to conv=ey, discharge &c the Deft. must plead performance specially and sub modo that is, by what means of conveyance &c that it may ap=pear to the Court -

So if the covenants are to do an act which must ap=pear of record, as to levy a fine, for the performance must ap=pear by record which must the court must try -

In covenants or bonds to save harmless, the Deft. may sometimes plead by way of performance, non damnificatus, in others he must plead, that he was saved (viz the Pltf.) harm=less and also quo modo that is shew the particular acts by which he has saved harmless - The following are the rules of distinct=ion -

If the covenant or bond is to save harmless, from any thing ascertained in the instrument as for payment of such a bond, non damnificatus is not good - He should plead that he ~~should so~~ had saved the Pltf. harmless & shew by what acts -

So I presume if the covenant is to save harm=less in general terms, that is from things unascertained as from all acts, damage and trouble that may arise

Cro. El. 916.
Carth. 247.
3 Mod. 252.
5 — 11 — 244.
4 Bac. 94 —

2 Lo. 3. 4. Cro. J.
363. 631. Cro.
El. 916.
4 Bac. 92. 2.

2 Roll R. 151.
Cro. J. 559. 60.
1 Show. 1. 5 Bu.
82 or 92. Esp.
205 —

4 Bac. 92. 124.
1 Lev. 89. 1 Lid.
444 —

2 Vent. 217.
Esp. 305 —

Salk. 578. 5.
Esp. 356. Cro.
6. 426. Cro.
J. ~~[illegible]~~ 300. 633.

from a lawsuit, by any particular act, or by praying &c non dam=nificatur is not good —

But if the covenant or bond is general to save harm=less from all acts that subject to costs charged &c, especially if no specific mode is prescribed non damnificatus is good —

Yet in this case if the Deft. pleads affirmatively, that he has saved the Pltff. harmless he must plead quo modo —

If the covenant is for an act to be done, even by a stranger performance must be pleaded specially, that is ac=cording to the preceding distinction. There is an exception I suppose in case of a multiplicity of ~~mute~~ acts &c —

If the Deft. pleads non damnificatus, a replic=ation consisting of a general traverse is ill; The Pltff must shew the special damnification; Thus if the declaration is that the "Deft. has not saved the Pltff. harmless" and the plea that "the Pltff. has not been damnified" a special breach in the replication is necessary —

A covenant in one deed, cannot be pleaded in bar to an action on a covenant in an other deed, unless it be in the nature of a defeasance.

Still however a defeasance in a seperate deed may be so pleaded. 3 Salk. 298 „ 8.

1 Lev. 152. Esp.
306.

3 T. R. 782.
3 Bac. 698.
Yelv. 26. Sid.
208.

3 Bac. 697.
2 Vent. 99.
Salk. 893.
2 T. Raym.

2 T. R. 292.
Stra. 1146.
5 Co. 18.

5 Co. 67. 8. 18.
19. —

But the second deed must clearly appear to have been in=
=tended as a defeasance, and to contain proper words for a defea=
=sance, or "reciting the first deed and declaring it to be void &c.

But one covenant may be pleaded in bar to a covenant, in the same deed without words of defeasance, for the sense is to be collected from the whole deed, as where there is a cove=
=nant that the lessee shall pay so much rent, and one by the les=
=sor, that the lessee may retain so much for repairs.

If three covenant jointly and severally, all may be sued or one but two cannot. The reason of this is, that the covenant must be treated as altogether joint or several.

This last rule is common to all covenants. If the covenant is joint only, all the covenantees must be sued.

If there are two or more joint covenantees, obligees &c all must join in an action otherwise the Deft. must be would be charged doubly.

This rule also is common to all contracts. If all do not join the Deft. on oyer may demur. In some ca=
=ses where one covenants with two or more obligees, jointly & severally, that is to them and either of them or each of them one of the obligees may sue alone in others all must join.

The rule is this "if the interest of the obligees ap=
=pears to be several each may sue seperately, as where there

2 Bac. 699. 8 Co. 136. Salk. 300. Co. Lit. 264 –

1 Bac. 696.
5 Co. 18. 19.
Jenk. 262.

5 Co. 19a

Stra. 553. 4
Bac. 116. Eno.
J. 13. 14.

Stra 559.
4 Bac. 116.
Co. Ej. 13. 14 –

Eno. C. 373.
4 Mod. 62.
10 – 1. – 515.
Salk. 240.
2 Bac. 311.

Stra. 1146.
2 T. Ks. 37.
Burr. 323. –

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is a devise to A. of black acre, and to B. of white acre and the lessee covenants with both and each as to all.

But if black acre only is ~~delivered~~ devised to and the lessee covents with each &c the interest of the lessees is joint and both must join, in each action on the covenant.

So the Co. obligors or covenantors may bind themselves severally for the same cause; yet Co. obligors cannot have several interests or rights of action for the same cause.

So against two jointly and severally of the same thing, is joint only. 5 Co. 9a.

If two covenant jointly and severally each may be sued alone, for the neglect of the other; tho' the one sued has not been negligent; recovery against one is no bar as to the other; so taking the body of one on execution is no bar as to the other; but actual satisfaction is a bar.

× If several are bound jointly and severally and one is made Exr. by the obligee; the obligation is released at law.

So in Chancery as to the obligees representatives: but not as to the creditors or legatees. 2 Pow. 244. 245.

If an instrument recites that A. B. & C. on one part covenanted to execute a certain agreement and A. does not execute the covenantee may sue B. & C. alone and aver that A. did not execute.

3 Bac. 697.
1 H. Bl. 236.
Burr. 2611.

Hob. 51.

5 Com. 53. Cro.
J. 432. Hard.
42. 1 Roll 463.
" — " — 625 —

5 Com. 58. Cro.
Jl. 249. 250.

1 Roll 462.

1 Roll 469.

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If two or more bind themselves in an obligation togather; or make a promise togather, the contract is joint of course I suppose the word "jointly" is not used unless words implying a several obligation or duty are used.

Notice and Request.

At Com. Law, a request by the Pltf. is clearly necessary, but in many cases it may be by writ only.

The Pltf. may always aver notice to the Deft., when action lies not without notice; as where the fact on which the demand arises, is as between the parties, confined is as between the parties confined to the Pltfs. knowledge as in case to ~~promise~~ of promise to pay be at such a rate, as any other person shall pay the Pltf. for the same.

But if the promise is to pay as much as ~~[illegible]~~ P. States should pay, notice is not necessary.

So on a promise to deliver so much corn if the Pltf. approve it. the Pltf. must aver that he gave notice to the Deft. that he did approve it.

So on a contract to account ~~to~~ before auditors, when the obliger shall assign; the Pltf. must aver notice ~~to~~ to the Deft.

So it must appear that notice was given in due time; as on a promise to pay before the end of such a ~~fair~~, as much as

1 Roll. 462.
463. & Buls. 144.
Hob. 14. 2 Bl.
Bl. 315. 316.

5 Com. 52.
Lutw. 281. —

3 Salk. 304.
Cro. El. 74 —

5 Com. 52.
Cro. J. 183.

the Pltff. disburses: the Pltff. should aver notice given before the end of the fair, otherwise it is too late —

But if the Deft. contracts &c on performance of an act by a stranger, the Pltff. need not aver notice. But in this case the Deft. must take notice at his peril or where there is a promise to pay &c when J. Stiles marries —

So in some cases it seems, that the Deft. is bound to give notice; as where he promises to deliver so much sum when he shall receive it —

In some cases the Pltff. must make and aver a special request; as if the Deft. engages to do a collateral act, no day being fixed: or on request.

It is said that no actual request is necessary, when the debt or duty is precedent to the contract, or promise, on which the demand arises, tho' the contract be to do on request, for here the request is not the cause of action. But this rule must be understood of those cases in which the subsequent contract does not vary the duty already existing; for the subsequent contract may be to do a collateral thing on request &c.

But where the right of action is founded on the ~~right of a~~ promise and request, there being no antecedent duty, a special request must be as where there is a promise to pay on request such sums as the entertainment of the

5 Com. 52.
Cro. J. 183.
Cro. El. 85.
Lutw. 231.
Cro. El. 74. 5.

Cro. El. 74. 5.
5 Com. 52.
2 Buls. 299.
Cro. J. 183.

3 Salk. 304.

Palm. 389. 3 Salk.
304. Cro. E. 74.

Pltff. should come to.

When a partial request is necessary the time and place must be averred.

The want of an averment of a special request when necessary is not cured by verdict.

So upon a promise to pay on condition that J. S. does not pay on request ~~to J. S.~~ a special request to J. S. must be aver=ed.

On a promise to pay the debt of a stranger upon re=quest, a special request must be alledged for there was no ante=cedent duty and the request is part of the duty agreement.

When a special request is necessary the averment is traversable; when unnecessary the averment is not traversable.

It is a general rule that where there is a contract, to do a certain thing "on demand" and the Deft. cannot dis=charge himself by tender without request, a special request is necessary: thus on due bills given by merchants to de=liver such a sum in goods to the holder, request must be made not only because the merchant cannot discharge himself without request but because the common course of business has estabtished the necessity of a demand.

So I suppose if a merchant engages to deliver such a sum in goods at a time fixed, for he cannot retect the

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goods: For the same reason as operated in the example, first put on the score of general convenience, requests must be made for pay=ment, from public officers, in their official capacity. On the other hand when the Deft. can discharge himself by tender, a special demand is not generally necessary, tho' the agreement be, he to pay the "on demand".

The two last rules so far as they interfere with the par=ticular ones laid down, are subordinate.

Questions which have arisen under the Constitution of the U. States.

The 10th section of the 1st article of the Constitution of the U. S. declares, 1st "That no statute shall make any thing but gold and silver coin a payment tender in payment of debts. 2d "Nor pass any ex post facto law; no law impairing the obligation of contracts.

The supreme court of the U. S. have determined that an ex post facto law means a law which extends to criminal cases only and differs from a retrospective alias a retroactive which extends as well to contracts as to crimes.

A retrospective law which regards civil causes only is not then forbidden by the constitution, tho' it is by the Com. Law

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So that no law should be made "impairing the obligation of contracts" in a Com. Law doctrine. The two last recited clauses of the constitution are then merely declaratory of the Com. Law.

Every thing respecting retrospective laws effecting "civil contracts" is meant to be provided for by the clause, forbidding any laws being made "impairing the obligations of contracts" therefore by the constitution all laws having a retrospective operation whether civil or criminal are prohibited.

It has been a question whether special acts of insol=vency, have their forbidden retrospective operation. The first insolvent acts which were ever made undoubtedly had their retro=spective operation. Had there never till now been any insolvent acts made special insolvent acts made, they would come within the constitution. But at present men when they enter into contracts are fully apprised of their liability to be defeated by insolvent acts passed by the Legislature. The great question has been whether the constitution intended to make any alteration in this state of things.

This question was first brought up before a branch of the national Court, in the state of Con. in this man=ner. One Huntington petitioned the legislature for a special act of insolvency; while the petition was pending, he prayed for a writ of protection that he might come and attend the

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Assembly free from arrest: the writ was granted and while he was attending the assembly under their protection, his creditors directed the sheriff to attach his body and commit him to prison on the ground that the assembly had no power to grant his petition and of course the writ of protection would be void; the sheriff accordingly committed him.

Huntington then praid out a writ Habeas corpus from the assembly, which was granted commanding the sheriff (Chester) to release him which done the creditors brought an action against the sheriff before the national court; it was there determined by Judges Law and Chase (with the additional opinion of Cushing) that a state had a right to pass special acts of insolvency without infringing the constitution. This was about the year 1795 This opinion has been affirmed by the supreme court at Philadelphia. So even if the first insolvent act was an infringement of the Com. Law that communis error facit jus would at this day prevent such consequence as is the construction at present given to mortgages.

REEVE'S
LECTURES

III